

MINUTES OF SPECIAL CONVOCATION

Wednesday, 22nd September, 1993
9:30 a.m.

PRESENT:

The Treasurer, (Paul S. A. Lamek), Bragagnolo, Brennan, Carter, Cullity, Elliott, Goudge, Hickey, Hill, Kiteley, Lamont, Moliner, Lax, Levy, Palmer, Sealy, Somerville, Thom and Wardlaw.

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IN PUBLIC

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The Treasurer welcomed to Convocation, Ms. Marie Moliner the newly elected Bencher.

The Treasurer also welcomed two visitors from Czechoslovakia, Libor Grygarek and Jaroslava Novotna of the General Prosecutor's Office of the Czech Republic.

DISCIPLINE COMMITTEE

Re: SPENCER BLACK, North York

The Secretary placed the matter before Convocation.

The reporter was sworn.

Messrs. Goudge and Cullity withdrew.

Mr. Gavin MacKenzie appeared for the Society and Mr. Alan Price appeared on behalf of the solicitor. The solicitor was not present.

Mr. MacKenzie requested an adjournment on consent to the October discipline Convocation. He advised that a notice of disagreement had been filed and that records needed to be prepared.

Convocation granted an adjournment to the October Special Convocation.

Counsel retired.

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Re: ROSS HAINSWORTH, Edmonton

The Secretary placed the matter before Convocation.

The reporter was sworn.

Mr. Wardlaw withdrew.

22nd September, 1993

Mr. Gavin MacKenzie appeared for the Society. No one appeared for the solicitor nor was the solicitor present.

Mr. MacKenzie requested an adjournment on consent to the October Special Convocation. He advised that a notice of disagreement had been filed and that records needed to be prepared.

Convocation granted an adjournment to the October Special Convocation.

Counsel retired.

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Re: ROGER EDGAR BELLEFEUILLE, Alexandria

The Secretary placed the matter before Convocation.

The reporter was sworn.

Ms. Lax and Mr. Brennan withdrew.

Mr. Stephen Foster appeared for the Society. The solicitor appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 18th August, 1993 together with an Affidavit of Service sworn 15th September, 1993 by Ronald Hoppie that he had effected service on the solicitor by registered mail on 20th August, 1993 (marked Exhibit 1) together with the Acknowledgement, Declaration and Consent signed by the solicitor 22nd September, 1993 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Thomas G. Bastedo, Chair
Joan L. Lax
Stuart Thom

In the matter of
The Law Society Act
and in the matter of

Stephen Foster
for the Society

ROGER EDGAR BELLEFEUILLE
of the Town
of Alexandria
a barrister and solicitor

Not Represented
for the solicitor

Heard: May 18, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On December 10, 1992, Complaint D212/92 was issued against Roger Edgar Bellefeuille alleging that he was guilty of professional misconduct.

The matter was heard in public on May 18, 1993, before this Committee consisting of Thomas G. Bastedo, Chair, Joan L. Lax and Stuart Thom. The Solicitor attended the hearing and represented himself. Stephen Foster appeared on behalf of the Law Society.

DECISION

Complaint D212/92

2. a) he failed to produce forthwith, for the purpose of an investigation by the Law Society pursuant to section 18 of Regulation 573 under the Law Society Act, all evidence, vouchers, records, books, papers required for the purpose of the investigation though requested to make arrangements to produce same on December 2, 1991, April 21, 1992, June 14, 1992 and August 4, 1992;
- b) he failed to maintain proper books, records and accounts in connection with his practice contrary to section 15 of Regulation 573 under the Law Society Act;
- c) he practised law while suspended for non-payment of his annual fees from March 27, 1992 to May 27, 1992;
- d) he borrowed \$25,000.00 from his client, Gerry Deguire, and \$50,000.00 from his client Gerry DeGuire's company Gerry DeGuire Plumbing & Heating Ltd.;

Evidence

Part of the evidence before the Committee contained the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D212/92 and is prepared to proceed, without counsel, with a hearing of this matter on May 18 and 19, 1993.
2. The Society agrees that it will seek the withdrawal of Particular e) of Complaint D212/92 based on the Solicitor's Undertaking to cooperate with the Law Society's investigation into his practice, a copy of which is attached as Exhibit "A" to this Agreed Statement of Facts.

II. ADMISSIONS

3. The Solicitor has reviewed Complaint D212/92 and admits particulars a) through d) contained therein. The Solicitor also admits that the particulars in the Complaint together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar in 1978.

5. The Solicitor is currently working with a real estate syndicate and is not engaged in private practice. He is currently exempted from errors and omissions coverage.

Particulars a) and b) - Failure to produce and maintain proper books and records

6. The Law Society began an examination of the Solicitor's books and records on March 18, 1991. The Law Society's examination disclosed that the Solicitor's books and records were not in full compliance with sections 13, 14, and 15 of Regulation 573. The Law Society's examiner describes the deficiencies as minor. A copy of the Law Society examiner's report is contained at Tab 1 of the Book of Documents.

7. The Law Society authorized an audit of the Solicitor's books and records and in October, 1991 assigned the audit to Mr. Jean-Marc Lafreniere.

8. On October 30, 1991 Mr. Lafreniere telephoned the Solicitor and left a message on his answering machine. The Solicitor did not return the message.

9. Mr. Lafreniere telephoned the Solicitor and left messages on November 15, 1991, and twice on November 26, 1991. Mr. Lafreniere was unsuccessful in reaching the Solicitor.

10. Mr. Lafreniere learned that the Solicitor would be at the Alexandria courthouse on December 2, 1991. He attended at the courthouse and approached the Solicitor who advised that he was busy all day but would call that evening in order to schedule a meeting. The Solicitor never called Mr. Lafreniere to schedule this meeting.

11. On April 21, 1992 Mr. Lafreniere attended at the law offices of Mr. Richard W. Parisien. The Solicitor was meeting with Mr. Parisien in respect of a matrimonial matter.

12. Mr. Lafreniere explained to the Solicitor that he wished to see the Solicitor's books and records. The Solicitor asked which particular files interested the Law Society's auditor. Mr. Lafreniere replied that he wanted to see all his files and, in particular, the following client files: Robinson, Lavallee and Maisonneuve.

13. The Solicitor replied that he could not make the Robinson file available as he was going to deliver it to John Crouchman, a Kingston lawyer, on Monday, April 27, 1992. He stated that Mr. Crouchman was representing him in the assessment of his fees. Mr. Lafreniere asked the Solicitor if he could see the file before April 27, 1992 and stated that he would accommodate the Solicitor as to the time and the place of a meeting. The Solicitor replied that this would not be possible because he was too busy.

14. The Solicitor stated that he did not have the Maisonneuve file. He stated that it was an old file and had probably been destroyed. He explained that several files had been destroyed at his previous office during a flood caused by a broken pipe. He stated that he would have to review his records to see if he had any information on this file.

15. The Solicitor then stated to Mr. Lafreniere that he was not too concerned about the Law Society's investigation and any possible discipline charges since he was only devoting approximately 10% of his time to the practice of law and the remainder of his time was spent on business ventures. The Solicitor also stated that he was not sure that he wanted to remain a member of the Law Society since it resorted to spying on its members.

16. The Solicitor then stated that he had to leave and offered to meet Mr. Lafreniere on May 29, 1992. Mr. Lafreniere replied that he was not prepared to wait another five weeks to meet. The Solicitor stated that he would call Mr. Lafreniere and that maybe they could meet on April 29, 1992.

17. Subsequently, the Solicitor called Mr. Lafreniere and suggested they meet at 4:00 P.M. on May 6, 1992 at the library of the Supreme Court of Canada. During this meeting, Mr. Lafreniere repeated his request to see the Maisonneuve file. The Solicitor stated that he would not allow the Law Society to see this file. Mr. Lafreniere explained that the Law Society needed to investigate information it had received from a client who had been a minor at the time the Solicitor had represented her. The Solicitor replied that he considered the parents of the minor as being his clients since they had retained him and that he therefore did not feel he had any responsibility to answer any allegations by the minor. He again stated that the Law Society was not allowed to look at this file.

18. Mr. Lafreniere insisted that he needed to see the Solicitor's files and that he would have to attend at the Solicitor's office to do this. The Solicitor suggested a meeting on June 17, 1992 at his residence in Alexandria, where he maintained his office, and this was confirmed by letter sent May 19, 1992 to the Solicitor. A copy of the Law Society's May 19, 1992 letter is contained at Tab 2 of the Document Book.

19. On June 14, 1992 the Solicitor telephoned Mr. Lafreniere and cancelled the meeting. The meeting was rescheduled for June 29, 1992 and this was confirmed by letters dated June 15, 1993 from the Solicitor to Mr. Lafreniere and June 17, 1992 from Mr. Lafreniere to the Solicitor. Copies of the letters are contained at Tab 3 of the Document Book.

20. Mr. Lafreniere subsequently telephoned the Solicitor and left a message that he was unable to attend the June 29, 1992 meeting. The Solicitor called back and left a message suggesting a meeting on August 5, 1992.

21. On August 4, 1992 the Solicitor called Mr. Lafreniere to inform him that due to his recent separation from his wife and due to his having to move from his home, the meeting would have to be rescheduled to August 26, 1992.

22. On August 26, 1992 at 9:00 A.M., Mr. Lafreniere attended at the Solicitor's residence. He was unable to enter the property because of a locked gate and there did not appear to be anyone at home.

23. Mr. Lafreniere concluded that the Solicitor is not cooperating with the examination of his books and records and is trying to continually delay or prevent the Society's examination from taking place.

24. The Solicitor admits that he failed to produce his books and records to the Law Society. The Solicitor also admits that he has failed to maintain proper books and records and has failed to keep his books and records up to date.

25. The Solicitor has signed an Undertaking, a copy of which is attached as Exhibit "A" to this Agreed Statement of Facts, to produce his books and records in their current state and to bring them up to date and correct any deficiencies by July 31, 1993.

Particular c) - practising law while suspended and without errors and omissions coverage

26. The Solicitor was suspended for non-payment of his annual fees from March 27, 1992 to May 27, 1992.

27. By letter dated May 27, 1992 the Law Society confirmed receipt of the Solicitor's fees and that his suspension had been terminated. The Law Society also confirmed the Solicitor's request for exemption from the Law Society's Errors and Omissions Insurance Plan for the entire calendar year 1992. A copy of the Law Society's May 27, 1992 letter is contained at Tab 4 of the Document Book.

28. On April 21, 1992 the Solicitor acted for a client in a matrimonial matter (see paragraph 11 above) while he was suspended from the practise of law and without errors and omissions coverage.

29. The Solicitor admits that he knew he was suspended from March 27, 1992 to May 27, 1992 and that he practised law during this period.

Particular d) - borrowing from clients Gerry DeGuire and Gerry DeGuire Plumbing & Heating Ltd.

30. The Solicitor began acting on behalf of Gerry DeGuire in 1984 or 1985 in respect of the purchasing and mortgaging of real estate.

31. The Solicitor is related to Mr. DeGuire through marriage in that the Solicitor's wife is Mr. DeGuire's first cousin.

32. In early 1988 Mr. DeGuire retained the Solicitor to negotiate a marriage contract with his spouse in order to provide for the orderly division of property in the event of a subsequent separation.

33. In April, 1988, Mr. DeGuire lent the Solicitor the sum of \$50,000.00. The loan was repayable in one year.

34. In June, 1988, Mr. DeGuire lent the Solicitor a further amount of \$25,000.00. The loan was repayable on demand.

35. The Solicitor made some partial repayments on the \$25,000.00 loan but defaulted on the balance and on the repayment of the \$50,000.00.

36. On February 7, 1991 Mr. DeGuire commenced an action against the Solicitor in respect of the \$50,000.00 loan. A copy of the Statement of Claim dated February 7, 1991 is contained at Tab 14 of the Document Book.

37. On February 7, 1991, Mr. DeGuire also commenced an action against the Solicitor in respect of the \$25,000.00 loan. A copy of the Statement of Claim dated February 7, 1991 is contained at Tab 15 of the Document Book.

22nd September, 1993

38. On September 11, 1991 Mr. DeGuire obtained judgment in the amount of \$10,582.40 in respect of the \$25,000.00 loan. A copy of the September 11, 1991 judgment is contained at Tab 16 of the Document Book.

39. On September 11, 1991 Mr. DeGuire obtained judgment in the amount of \$65,074.81 in respect of the \$50,000.00 loan. A copy of the September 11, 1991 judgment is contained at Tab 17 of the Document Book.

40. On September 3, 1991 the Solicitor and Mr. DeGuire entered into a forbearance agreement with respect to this judgments. A copy of the September 3, 1991 forbearance agreement is contained at Tab 18 of the Document Book.

41. Since the date of the judgment, the Solicitor has paid Mr. DeGuire the sum of \$1,000.00.

42. The Solicitor admits that he borrowed money, as set out above, from his clients, Gerry DeGuire and Gerry DeGuire Plumbing and Heating Inc..

V. DISCIPLINE HISTORY

43. On June 8, 1980 the Solicitor was reprimanded in Committee and ordered to pay \$565 in costs in connection with a Complaint that he made a false affidavit of legal age and signed the jurat of that document.

VI. PENALTY

44. The Solicitor and the Law Society jointly submit that the Solicitor should be suspended for a period of three (3) months.

VII. COSTS

45. The Solicitor agrees to pay the Law Society's costs in the amount of \$1000.00 in this matter on terms to be negotiated between the Law Society and the Solicitor.

DATED at Toronto this 18th day of May, 1993."

D212/92

THE LAW SOCIETY OF UPPER CANADA

PROVINCE OF ONTARIO

IN THE MATTER OF the Law Society Act;

AND IN THE MATTER of Roger Edgar Bellefeuille,
of the Town of Alexandria, a Barrister and
Solicitor.

UNDERTAKING

WHEREAS I have entered into an Agreed Statement of Facts with the Law Society in respect of Complaint D212/92;

22nd September, 1993

AND WHEREAS the Law Society has agreed to seek leave to withdraw Particular e) of the said Complaint which alleges that I am ungovernable as I refuse to cooperate with the Law Society's investigation into my practice;

I, Roger Edgar Bellefeuille, hereby undertake as follows:

1. I will cooperate fully with the Law Society's investigation into my practice. Without restricting the generality of the foregoing, I will cooperate fully with the Law Society's Complaints Department and their investigation of client complaints and with the Law Society's Audit and Investigation Department and their investigation of my books and records and their review of my files.
2. I will produce all my books and records, in their present state, to the Law Society for examination during the week of May 31, 1993 and thereafter as requested by the Law Society upon reasonable notice. I agree that any extension of the time to produce my books and records beyond the week of May 31, 1993 will be granted only in writing by Discipline Counsel for the Law Society.
3. I will bring my books and records up to date by July 31, 1993. I agree that any extension of the time to bring my books and records up to date beyond July 31, 1993 will be granted only in writing by Discipline Counsel for the Law Society.
4. I will produce to the Law Society any files which it wishes to review during the week of May 31, 1993 and thereafter as requested by the Law Society upon reasonable notice. I agree that any extension of the time to produce these files beyond the week of May 31, 1993 will be granted only in writing by Discipline Counsel for the Law Society.
5. Without restricting the generality of the foregoing, I agree to produce the following files in accordance with the preceding paragraph:
 - Gerry DeGuire and Gerry DeGuire Plumbing and Heating file(s);
 - Lavallee file(s);
 - Charles McCauley file(s);
 - Pierre Roger re: Dr. Sydelle Markson Katzer file(s);
 - Jean Paul Brunet file(s).

I agree to take immediate steps to ascertain the location of the Sonia Maisonneuve file(s) and to advise Discipline Counsel of the Law Society, in writing, of the status of this file prior to the week of May 31, 1993.

I consent to the Law Society reviewing the contents of my file(s) respecting Ronald and Nicole Robinson file(s), which file(s) have been turned over to the new solicitors acting for Mr. and Mrs. Robinson.

I acknowledge that any breach of this undertaking may lead to further discipline proceedings, and I hereby consent to this document being introduced in evidence in those proceedings. I have retained a copy of this signed undertaking.

I further acknowledge that I have been advised of my right to counsel in respect of Complaint D212/92 and that I have decided to proceed without representation in respect of the Complaint and the signing of this undertaking.

DATED at Toronto this 18th day of May, 1993.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Roger Edgar Bellefeuille be suspended for a period of three months. The period of the three month suspension will begin on the day after the matter is heard in Convocation and Convocation's decision is made. With respect to the matter of costs, the Committee accepted the recommendation of the Society that the Solicitor pay the Society's costs in the amount of \$1,000.00. These costs will be paid within thirty days following Convocation's decision.

REASONS FOR RECOMMENDATION

This matter which came before the Committee on May 18, 1993, concerned a complaint by the Society that the Solicitor had failed to produce for the purpose of an investigation, various papers required for the investigation; that the Solicitor had failed to maintain proper books and that he had practiced law while suspended for non-payment of his annual fees. The Solicitor was also accused of borrowing money from his client.

There will be a finding of professional misconduct of the complaint set out in paragraphs 2(a), (b), (c), and (d) of the formal complaint.

The Committee would like to deal first with the matters of the failure to produce proper books and records and also with the complaint that the Solicitor practised law while under suspension.

It is a prime tenet of the Society's governance of the profession that upon reasonable demand, the Solicitor must produce for inspection by the Law Society's officials the proper books and records to ensure that the members of the Society are practising in accordance with the rules of regulations of the Society because it is only that enforced requirement that the Law Society can justify its governance of the members in the public interest.

The Solicitor failed to produce the proper books and records, has admitted that he has done so, but on the other hand, has undertaken to supply the books and records by July 31st, 1993. It perhaps might be noted in parenthesis that if the proper books and records are not supplied by the date given through the Solicitor's undertaking, there would be a further matter which could give rise to another complaint by the Society.

The Solicitor practised law while under suspension on one occasion and while that perhaps is one of the more minor aspects of the complaint, nevertheless, if a Solicitor does practice while under suspension, it has ramifications for the insurability of the Society's members. That matter has been dealt with.

The most serious of the complaints brought before the Committee is that relating to the borrowing from one of the Solicitor's clients in the sum of twenty-five thousand dollars on one occasion, and fifty thousand dollars from the client on another occasion. The Committee regards this matter as extremely serious one. Under no circumstances may a Solicitor borrow money from his or her client. In this particular case, the Solicitor has been sued by the client and a judgment has been registered.

It is for these reasons that the Committee accepts the joint submission of the Society and the Solicitor that the Solicitor be suspended for three months. The period of the three month suspension will begin on the day after the matter is heard in Convocation and Convocations's decision is made.

22nd September, 1993

With respect to the matter of the costs, the Committee accepts the recommendation of the Society that the Solicitor pay the Society's costs in the amount of one thousand dollars. These costs will be paid within thirty days following Convocation's decision.

Roger Edgar Bellefeuille was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 19th day of April, 1978.

ALL OF WHICH is respectfully submitted

DATED this 18th day of August, 1993

Thomas G. Bastedo,
Chair

It was moved by Ms. Kiteley, seconded by Mr. Goudge that the Report of the Discipline Committee be adopted.

There were no submissions and the Report was adopted.

It was moved by Ms. Kiteley, seconded by Mr. Goudge that the Recommendation as to Penalty that is, that the solicitor be suspended for 3 months and pay costs in the amount of \$1,000 to be paid within 30 days, be adopted.

Mr. Foster made submissions in support of the Recommendation. The solicitor made no submissions.

Counsel, the solicitor, the reporter and the public withdrew.

An amendment was made to the Recommendation on page 14, third paragraph by adding the words "except in accordance with the Rules of Professional Conduct" at the end of the sentence beginning with "Under no circumstances", so the sentence now reads:

"Under no circumstances may a Solicitor borrow money from his or her client except in accordance with the Rules of Professional Conduct."

The Recommendation as to Penalty as amended was adopted.

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for 3 months effective September 23rd, 1993.

Counsel and solicitor retired.

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RE: EDWARD JOHN FREYSENG, Toronto

The Secretary placed the matter before Convocation.

The reporter was sworn.

Mr. Cullity withdrew.

Mr. Gavin MacKenzie appeared for the Society and Mr. Douglas Crane appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 17th August, 1993, together with an Affidavit of Service sworn 15th September, 1993 by Ronald Hoppie that he had effected service on the solicitor by registered mail on 20th August, 1993 (marked Exhibit 1) together with the Acknowledgement, Declaration and Consent signed by the solicitor 22nd September, 1993 (Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Philip M. Epstein, Chair
Stuart Thom, Q.C.
Mrs. Netty Graham

In the matter of
The Law Society Act
and in the matter of

Gavin MacKenzie
for the Society

EDWARD JOHN FREYSENG
of the City
of Toronto
a barrister and solicitor

Douglas Crane
for the solicitor

Heard: June 1, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On January 15, 1993, Complaint D24/93 was issued against Edward John Freyseng alleging that he was guilty of professional misconduct. This complaint was withdrawn and replaced with D24a/93 issued on June 1, 1993.

The matter was heard in public on June 1, 1993 before this Committee composed of Philip M. Epstein, Chair, Stuart Thom, Q.C. and Mrs. Netty Graham. Mr. Freyseng attended the hearing and was represented by Douglas Crane. Gavin MacKenzie appeared on behalf of the Law Society.

DECISION

The following particular of professional misconduct was admitted and found to have been established:

Complaint D24a/93

2. a) Between 1989 and 1992, inclusive, he misappropriated the sum of \$1,029,693.90, more or less, from clients.

Evidence

Part of the evidence before the Committee contained the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D24a/93 and is prepared to proceed with a hearing of this matter on June 1, 1993.

II. IN PUBLIC/IN CAMERA

2. The parties agree that this matter should be heard in public pursuant to Section 9 of the Statutory Powers Procedure Act.

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D24a/93 with his counsel, J. Douglas Crane, and admits particular 2(a) contained therein. The Solicitor also admits that particular 2(a) detailed in the complaint together with the facts as hereinafter set out constitute professional misconduct.

IV. BACKGROUND FACTS

4. The Solicitor is 55 years of age and was called to the bar in 1967. Until November 1992 when the facts that gave rise to this complaint became known, the Solicitor was a partner in the Toronto firm Blaney, McMurtry, Stapells, where he practised in the fields of corporate and commercial law and real estate. He has no prior discipline record.

5. The Solicitor was married to Daphne Duncanson in April 1969 and there were two children of that union, Signy, 21 and Adam, 16.

6. In or about 1979 unhappy differences arose between the Solicitor and his wife resulting eventually in a separation in the fall of 1981 and a divorce in 1985. During that four year period during the separation and divorce, the Solicitor acted for himself in negotiating with his wife a settlement of assets. During this period the Solicitor got in over his head financially because most of the parties' assets were distributed to the Solicitor's wife while the Solicitor assumed the responsibility for debts secured by the parties' Rosedale home and a cottage property.

7. The Solicitor also paid his wife \$5,000 a month as support for the children and her, and the Solicitor was required to pay the tax on that sum. This arrangement lasted from the spring of 1982 to the spring of 1987. This period was the start of the Solicitor's downfall because he got in over his head financially.

8. In 1982, the Solicitor met his current wife, Sandy. They were married in 1985 when his divorce from Daphne became final. There are two children of the second marriage, Kathryn, 7 and Stephen, 3.

9. The Solicitor continued to pay Daphne \$5,000 a month for two years while he was married to Sandra, that is from 1985 and 1987. This second union and the birth of the children led to further financial strain because he was paying for the support of his first wife while also supporting his second wife and children.

10. The Solicitor's financial problems were aggravated because he had become involved in a subdivision development project in Kingston called Tunnel Island beginning in 1981. In 1982 the Solicitor took over the project to protect the investments of clients to whom he had recommended the project.

11. The Tunnel Island project failed in large part because water lines and sewer lines were extremely expensive as a result of the fact that those lines had to be blasted out rather than dug through soft sandy soil with a backhoe. The underlying problem was the concentration of limestone in the area.

12. Accordingly, the Solicitor started pouring money into the Tunnel Island project. The Solicitor put money into it hoping he could save the project and pay off all the clients.

13. In 1982 or 1983 the real estate market collapsed in the Kingston area for a number of reasons, one of which was very high interest rates, as high as 21%. The expenses were continuing and interest was being accumulated.

14. The original financing for the Tunnel Island project came from Guaranty Trust and Northern and Central Gas. Eventually those funds were no longer available and the Solicitor obtained financing from Jerome S. Ublansky, a lawyer and a mortgage broker who was then the Solicitor's partner.

15. This relationship exacerbated the Solicitor's problems because the interest rates Mr. Ublansky charged and the pressure this put on the Solicitor made a bad problem worse.

V. FACTS RELEVANT TO COMPLAINT D24a/93

16. By 1989, the Solicitor had placed several mortgages on his home in an effort to keep clients and Mr. Ublansky at bay. In 1989, in order to prevent the eviction of his wife and family from his home, the Solicitor misappropriated funds from a client, Western Hemisphere Properties Limited. That money was used to pay off a second mortgage on the Solicitor's home and to stop foreclosure and a writ of possession. The Solicitor misappropriated these funds at a time when he was in extremely desperate straits. He came home from the hospital after the birth of his son and saw the sheriff's notice on the door evicting his wife and son.

17. By 1989 Mr. Ublansky knew all the lots had been sold and that there was still a sizable deficiency. That caused him to place more pressure on the Solicitor. The Solicitor believed that he could work out his financial problems. He never seriously contemplated going into bankruptcy.

18. Also in 1989 the Solicitor acted for some German clients who owned a property on Leonard Avenue, behind Toronto Western Hospital. He had acted for them previously on the purchase of the property. It was a good investment at the time because the building or a substantial portion of it was leased to doctors who operated or carried on practices out of Toronto Western Hospital.

19. At the time of the purchase neither the German clients nor the Solicitor could have foreseen that two or three years later Toronto Western Hospital would merge with Toronto General Hospital resulting in approximately three quarters of the doctors moving out to Toronto General on University Avenue. That left the building 75% vacant. The German clients became aware of these facts.

20. The Solicitor was authorized by his clients to arrange a mortgage loan to cover the deficiency. There was a deficiency because the rental payments no longer covered the mortgage payments and the operating costs. The mortgage that the Solicitor arranged, however, was for an amount that was much larger than necessary to cover the deficiency. The size of the mortgage that the Solicitor arranged was determined by his own financial requirements.

21. Approximately \$503,000 of the mortgage proceeds of \$625,000 were paid to Mr. Ublansky to reduce Mr. Ublansky's loans. \$66,785 was paid to Revenue Canada to pay a portion of the Solicitor's income tax arrears pursuant to a garnishment order. A further \$20,000 was used to replace funds belonging to Mr. Fritz Hermanns, which funds had previously been misappropriated by the Solicitor from the firm's mixed trust account. Thus the Solicitor misappropriated \$589,785 of the \$625,000 mortgage proceeds.

22. The Solicitor had the permission of his German clients to apply for the mortgage loan, but the clients did not know the size of the loan and of course did not authorize the Solicitor to appropriate the proceeds of the loan to his own use.

23. The Solicitor misappropriated funds from the mixed trust account of Blaney, McMurtry, Stapells to provide him with a source of funds to make most of the mortgage payments on the \$625,000 mortgage. The Solicitor also acknowledges having misappropriated funds by paying clients' creditors with other clients' trust funds because he was being pressured with threats of clients complaining to the Society.

24. In late 1992 and early 1993, the Law Society performed an audit that was initiated as a result of information received from the managing partner of Blaney, McMurtry, Stapells, namely that the Solicitor had acknowledged having borrowed money from a client. The firm's auditors were contemporaneously instructed to investigate further. The Solicitor then reported the problem immediately to Stephen Traviss of the Law Society by telephone, and believes that he was the first person to report the matter. The report was followed up by a telephone call and fax to the Law Society from the Solicitor's counsel.

25. The investigations disclosed apparent misappropriation by the Solicitor of client funds in large amounts. The firm arranged for sufficient funds to be deposited into its trust account to rectify the trust shortage.

26. The evidence that the Society has accumulated consists of documentation and admissions that the Solicitor misappropriated \$756,089.90 from the mixed trust account from nine clients. Thus the Solicitor has misappropriated a total of \$1,345,874.90 from clients (\$756,089.90 plus \$589,785). However, \$316,181 of the monies misappropriated were either paid to clients' creditors or directed to clients so that the net amount misappropriated from clients is \$1,029,693.90 (\$1,345,874.90 - \$316,181). The amounts misappropriated and repaid are as shown in the following chart:

Client	Amount Misappropriated	Amount Repaid	Net Amount Not Repaid
Western Hemisphere Properties Ltd.	\$224,981.17	\$96,308.00	\$128,673.17
Regina Schlomer	\$80,000.00	\$80,000.00	
Gordon Nelson Development Company Limited	\$10,225.00		\$10,225.00
Project Forty-Three Ltd.	\$96,308.00	\$96,308.00	
Fritz Hermanns	\$20,000.00	\$20,000.00	
592449 Ontario Limited	\$17,385.00		\$17,385.00
Francis Deacon	\$103,447.94		*\$103,447.94
Norma Brown	\$90,971.41	\$500.00	*\$90,471.41
Sceptre Investments Limited	\$112,771.31	\$23,065.00	\$89,706.31
Totals	\$756,089.90	\$316,181.00	\$439,908.90

*These amounts have been paid by Blaney, McMurtry, Stapell's errors and omissions insurers pursuant to the firm's innocent partner coverage.

27. As the misappropriations were made with cheques payable directly to his creditors and posted to clients' trust ledgers upon his instruction, the misappropriations were not apparent when the monthly trust comparisons were completed.

28. Sceptre Investments Limited is an investment counsellor for a pension fund. The Solicitor misappropriated \$112,771.13 from the proceeds of a mortgage loan, but advanced the balance of the funds to the borrower, Klaus Schell. There is a claim that he shouldn't have advanced the funds until he got a postponement from the Ontario Mortgage Corporation. Klaus Schell received money without giving the Solicitor the appropriate discharge or postponement from the Ontario Mortgage Corporation.

VI. FACTS RELEVANT TO PENALTY

29. The Solicitor has capital at Blaney, McMurtry, Stapells of \$157,100. He also has goodwill of \$62,500 and a holdback for the year ending January 31, 1993 of \$20,187 for a figure of \$239,787.00. The Solicitor is content if his capital in the sum of \$157,100 plus his goodwill of \$62,500 be used to repay creditors. He would like to use the holdback of \$20,187 to pay an income tax indebtedness.

30. The Solicitor has 25 units of capital in the firm totalling \$157,100. He has 25 units of goodwill totalling \$62,500. He has a draw holdback of \$20,187.50 for a total of \$239,787.50. The Solicitor is prepared to have the total of these funds applied to make restitution.

31. The law firm has deducted a number of items from the above total which deductions are questioned by the Solicitor as not being in accordance with the firm's partnership agreement. They are as follows:

Legal fees - Goodman & Goodman	\$ 7,628.87
BDO Dunwoody Ward Mallette	7,805.00
Reid Management Ltd. - press release	2,337.50
Mary Treasure's severance pay (January - March, 1993)	9,932.82
Unbilled time:	
R. Cohen 315 hrs x \$150/hr	47,250.00
D. Lash 100 hrs x \$150/hr	15,000.00
Clerks 160 hrs x \$100/hr	16,000.00
Unpaid accounts written off	<u>51,960.40</u>
TOTAL	<u>\$160,252.09</u>

32. Other firm deductions total \$229,292.26 which leaves a balance of only \$10,495.24 owing to the Solicitor. The Solicitor disputes all of the deductions.

33. If the monies in dispute are paid to the Solicitor, the Solicitor undertakes to direct that the monies be paid to reimburse the clients and the Society's insurers for the losses incurred.

34. The Solicitor was for approximately five years a tutorial leader in the Real Estate Section of the Bar Admission Course under Don Lamont, in the early 1970's. As well, he participated in a number of continuing lectures for the Law Society in real estate, and especially in relation to the introduction of the Land Titles System in Windsor, London, Peterborough, St. Catharines and Ottawa.

35. The Solicitor was a Trustee of the County of York Law Association for eight years and President during the Association's centennial.

36. The Solicitor also co-edited the fourth edition of Marriott & Dunn Mortgage Practice in Ontario with former Master William Dunn.

37. The Solicitor was very active in church, serving on the Official Board and the Executive Committee of Rosedale United Church for ten years and being appointed as Clerk of Session for two years, which is the senior lay position in this congregation.

38. The Solicitor has always been active in community matters and for eight years was a co-leader in negotiating for Eastbourne Community Association on Lake Simcoe in their fight to deal with the development of Maple Leaf Estates, with respect to a host of environmental safeguards in their development in the Town of Georgina. He was a director of the Empire Club of Canada for four years and recently stepped down as a Vice-President.

39. The Solicitor has always been involved in transportation and historical associations and societies, having been a director of Upper Canada Railway Society, Ontario Electric Railway Historical Association, Ontario Rail Association and the South Simcoe Railway Heritage Corporation. With respect to this last mentioned corporation, the Solicitor obtained all the provincial approvals for the operation of this railway which is the province's first steam train tourist railway.

40. The Solicitor is currently consulting in the railway industry.

41. The Solicitor has co-operated with the Law Society insurers. The Solicitor also assisted Doug Weber, the Law Society auditor who, in a letter dated May 31, 1993, stated:

22nd September, 1993

"Please be advised that I have met with Mr. Freyseng on three separate occasions including the initial meeting in December 1992 at your office. I have also had five or six telephone conversations with Mr. Freyseng. During my meetings and telephone conversations, I found Mr. Freyseng to be co-operative. He assisted me during the audit by answering my questions and providing supporting documentation when possible.

Mr. Freyseng's co-operation was greatly appreciated."

42. Luc Bertrand of Lindsey Morden Claim Services Limited in a letter dated May 31 1993 has confirmed that Freyseng assisted this Law Society insurance adjuster. The Solicitor has agreed to continue to co-operate as required.

43. The Society submits that the discipline hearing panel should recommend that the Solicitor be disbarred. The Solicitor requests the opportunity to resign. The Solicitor has already tendered his signed resignation.

DATED at Toronto this 1st day of June, 1993."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Edward John Freyseng be disbarred.

REASONS FOR RECOMMENDATION

The Committee starts by accepting the general rule, that in cases of large misappropriations, the lawyer should be disbarred unless there are extenuating mitigating circumstances. As a profession, it is essential that the Law Society send a very clear message that theft by lawyers will not be countenanced and the most severe penalty will be issued.

We are mindful of the reasons in the Ronald Paul Milrod matter and adopt the Committee's recommendation and the position that "... The Society cannot countenance theft and fraud by its members, and must express its disapproval in no uncertain terms. The penalty of disbarment is not meant to be reserved only for members who are thoroughly lacking in good qualities; experience shows that the penalty attends the tragic downfall of good lawyers who succumb to pressure as frequently as it is the fitting conclusion of an evil career."

We also accept and adopt the reasons in the Daniel Gilad Cooper matter, wherein the Committee states:

"... Mr. Cooper is not the typical candidate of disbarment. His was not the predicted last chapter of a checkered and unethical career. Yet disbarment is clearly the only appropriate penalty, as much required for the lawyer who throws away a hard earned reputation for integrity as it is for the scoundrel who caps a disreputable career with more of the same.

The legal profession would see public confidence rapidly evaporate if it failed to pronounce its condemnation of Mr. Cooper's conduct in the strongest possible terms. While his rehabilitation must be encouraged, that will have to take place outside of the legal profession. Any penalty short of disbarment would be grossly inadequate in reflecting the gravity of Mr. Cooper's misconduct and the censure of his peers."

22nd September, 1993

In the matter before this Committee we acknowledge that the Solicitor, having come forward, considerably shortened the process. The character evidence is considerable as is his contribution to the Law Society and to the community. But the aggravating circumstances outweigh these and the admissions of misappropriations over a period of time in excess of \$1,000,000 cries out for disbarment. The Solicitor has not made restitution because of his financial position and there is no doubt that the Society will become involved in dealing with the Solicitor's dishonesty.

The Society's mandate to govern in the best interests of the public, is to ensure that lawyers who are found guilty of this most serious offense be disbarred and that the profession see that those members are dealt the most severe penalty that its governing body can issue. The public and the profession can accept nothing less in these circumstances.

Edward John Freyseng was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 17th day of March, 1967.

ALL OF WHICH is respectfully submitted

DATED this 15th day of August, 1993

Mrs. Netty Graham
(for the Committee)

It was moved by Mr. Goudge, seconded by Mr. Somerville that the Report of the Discipline Committee be adopted.

There were no submissions and the Report was adopted.

It was moved by Ms. Kiteley, seconded by Mr. Goudge that the Recommendation as to Penalty, that is that the solicitor be disbarred, be adopted.

There were no submissions and the Recommendation as to Penalty was adopted.

Counsel and Mr. Freyseng retired.

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RE: ELYAHU DORON BENAIHAH, Toronto

The Secretary placed the matter before Convocation.

The reporter was sworn.

Ms. Elliott and Messrs. Wardlaw and Hickey withdrew.

Ms. Christina Budweth appeared for the Society and Mr. Mark Sandler appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 3rd August, 1993, together with an Affidavit of Service sworn 16th September, 1993 by Louis Katholos that he had effected service on the solicitor by registered mail on 10th August, 1993 (marked Exhibit 1) together with the Acknowledgement, Declaration and Consent signed by the solicitor 22nd September, 1993 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

J. James Wardlaw, Q.C., Chair
Michael G. Hickey, Q.C.
Susan Elliott

In the matter of
The Law Society Act
and in the matter of

Christina Budweth and Gavin MacKenzie
for the Society

ELYAHU DORON BENAIHAH
of the City
of Toronto
a barrister and solicitor

Mark Sandler
for the solicitor

Heard: September 9, 1992
April 7, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On June 23, 1992 Complaint D113/92 was issued against Elyahu Doron Benaiah alleging that he was guilty of professional misconduct. This Complaint was replaced with complaint D113a/92 issued on September 8, 1992.

The matter was heard in public on September 9, 1992 and April 7, 1993 before this Committee composed of J. James Wardlaw, Q.C., Chair, Michael G. Hickey, Q.C. and Susan Elliott. Mr. Benaiah attended the hearing and was represented by Mark Sandler. Christina Budweth and Gavin MacKenzie appeared on behalf of the Law Society.

DECISION

The following particular of professional misconduct was admitted and found to have been established:

Complaint D113a/92

- 2. a) During the period June 9, 1991 and March 11, 1992, he received funds totalling \$5,600 more or less, from various clients of his employer, Rosen, Fleming, which funds he withheld from the law firm and appropriated for his own use.

Evidence

Part of the evidence before the Committee contained the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D113a/92 and is prepared to proceed with a hearing of this matter on September 9, 1992.

II. IN PUBLIC/IN CAMERA

2. The parties agree that this matter should be heard in public pursuant to Section 9 of the Statutory Powers Procedure Act.

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D113a/92 and the agreed statement of facts with his counsel, Mark Sandler, and admits the particular contained therein. The Solicitor admits that the particular detailed in the complaint supported by the facts as hereinafter stated constitutes professional misconduct.

IV. FACTS

4. The Solicitor was called to the bar in April, 1986. He was an employee of the law firm Rosen, Fleming from 1984 to March 31, 1992. His practice was limited to the practice of criminal law. The Solicitor's employment with that firm was terminated upon the discovery of the matters which form the basis of the herein complaint.

5. Between June 9, 1991 and March 11, 1992, the Solicitor received \$5,600 from various clients of the firm as retainers which funds he withheld from the law firm and appropriated for his own use. Details are as follows.

Chirila Hodorgea - \$2,600

6. On July 22, 1991, Mr. Hodorgea's girlfriend provided the Solicitor with a cash retainer of \$3,000. The Solicitor deposited \$1,000 of these funds into the trust account of Rosen, Fleming and appropriated \$2,000 for his personal use.

7. Subsequently, Mr. Hodorgea provided the Solicitor with cash payments of \$200 on October 8, 1991 and \$400 on November 28, 1991. The Solicitor appropriated this additional \$600 to his own use.

8. The Solicitor defended Mr. Hodorgea on various charges in November, 1991. The full amount of the payments made by Mr. Hodorgea were earned by the firm in connection with the services rendered to him.

9. On December 2, 1991, the Solicitor instructed a secretary in the firm to prepare a billing to Mr. Hodorgea in the amount of \$1,000. At the request of the client he then prepared a separate bill for \$3,600 to account for the full payment received from the client. He "saved" both accounts on the firm's computer system. Both bills were in fact sent to the client who did not question either bill.

10. Subsequent to the discovery of the Solicitor's appropriation by Rosen, Fleming, a revised account dated April 20, 1992 was sent to the client. Copies of the Solicitor's two December 2, 1991 accounts as well as the firm's revised April 20, 1992 account are attached as Exhibit 1, collectively, to this agreed statement of facts.

David Riznek - \$500

11. Mr. Riznek provided the Solicitor with an initial cash retainer of \$2,500 on September 3, 1991. The Solicitor deposited the full amount into the trust account of Rosen, Fleming.

12. Mr. Riznek provided a further cash payment of \$500 on or about December 11, 1991. The Solicitor appropriated this payment for his own personal use.

13. On January 8, 1992, Mr. Riznek provided a final cash payment of \$250.00 to the Solicitor, for a new matter, which the Solicitor duly deposited into the trust account of Rosen, Fleming. These funds are still held in trust by the firm.

14. The Solicitor represented Mr. Rizneck in a matter that was successfully completed. The full amount of payments made by Mr. Rizneck were earned by the firm in connection with the services rendered by the Solicitor.

15. On December 20, 1991, the Solicitor sent Mr. Riznek an account for \$2,500. A copy of the account to Mr. Riznek is attached as Exhibit 2 to this agreed statement of facts.

Johnny Jones - \$500 or \$1,000

16. Mr. Jones provided the Solicitor with a cash payment of either \$1,000 or \$1,500 on June 9, 1991. The Solicitor deposited \$500 of these funds into the trust account of Rosen, Fleming and appropriated either \$500 or \$1,000 for his personal use.

17. Mr. Jones provided a further cash payment of \$500 to the Solicitor on February 6, 1992. The Solicitor deposited these funds into the general account of Rosen, Fleming.

18. On February 7, 1992, the Solicitor rendered an account in the amount of \$1,000 to Mr. Jones. A copy of the Solicitor's February 7, 1992 account is attached as Exhibit 3 to this agreed statement of facts. Mr. Jones was successfully defended by the Solicitor. The full amount of payments received was earned by the firm.

19. Mr. Jones cannot recall the amount of money he paid to the Solicitor for his services. A revised account evidencing a payment of \$2,000 by Mr. Jones was rendered to him by Rosen, Fleming on April 20, 1992. A copy of Rosen, Fleming's April 20, 1992 account is attached as Exhibit 4 to this agreed statement of facts.

20. The Solicitor's restitution to Mr. Jones was based on the assumption that the Solicitor had been given \$2,000 by Mr. Jones.

A. Abramov - \$800

21. Mr. Abramov provided a law clerk in the Solicitor's office with a cash retainer of \$500 on October 30, 1991.

22. In mid-January, 1992, Mr. Abramov gave the Solicitor an additional \$700 in cash.

23. On February 3, 1992, Mr. Abramov provided the Solicitor with an additional \$600 in cash.

22nd September, 1993

24. The Solicitor deposited \$1,000 of the funds provided by Mr. Abramov into the trust account of Rosen, Fleming. The Solicitor appropriated the additional \$800 for his own use.

25. The Solicitor did not render an account to Mr. Abramov as the discovery of this appropriation occurred prior to Mr. Abramov's charges being heard.

J. Shearer/T. Surridge - \$150

26. Mr. Shearer and Ms. Surridge provided the Solicitor with a cash retainer of \$1,000 on March 10, 1992. The Solicitor deposited \$850 into the trust account of Rosen, Fleming and appropriated \$150 for his personal use.

27. The Solicitor did not render an account to Mr. Shearer and Ms. Surridge as their charges had not been heard at the date of the Law Society's discovery of this appropriation.

Gabriel Cinjau - \$100

28. On January 8, 1992, a student in the office of Rosen, Fleming, Jon Bliss, attended with Mr. Cinjau to set a date for trial. The matter was remanded to January 17, 1992. On January 8, Mr. Bliss received \$500 in cash from Mr. Cinjau on the understanding that an additional \$500 would be paid on January 17, 1992.

29. Mr. Bliss documented the \$500 payment by way of a memorandum to the file. He gave Mr. Cinjau's retainer to the Solicitor.

30. The Solicitor deposited \$400 of Mr. Cinjau's payment to the trust account of Rosen, Fleming and appropriated the remaining \$100 for his own benefit. A copy of Mr. Bliss's memorandum is attached as exhibit 5 to this agreed statement of facts.

31. Mr. Cinjau provided a further \$500 to the firm on January 17 as promised. These funds were properly deposited in the firm's mixed trust account to Mr. Cinjau's credit.

32. An account in the amount of \$900 was prepared on the Solicitor's instructions on January 20, 1992. A copy of that account is attached as Exhibit 6 to this agreed statement of facts. Mr. Cinjau denies receiving a copy of this account. He has been provided with a proper account representing the entire amount of fees paid to Rosen, Fleming. The entire amount of fees was earned by the firm.

Stefan Sandu - \$200

33. Mr. Sandu approached the Solicitor to act for him in a criminal matter. Mr. Sandu provided the Solicitor with \$200 at the Scarborough Provincial Court at the set date of the matter. He was to provide further funds before the Solicitor would undertake to act. He set a date "with or without counsel".

34. The Solicitor did not deposit the money received from Mr. Sandu into the firm's trust account, but rather appropriated the funds for his own use.

35. On May 11, 1992, Mr. Sandu attended at the offices of Rosen, Fleming asking for the Solicitor. He was advised the Solicitor was no longer with the firm. When he advised Mr. Fleming that the Solicitor had agreed to represent him on a trial the following day the firm contacted a clerk of the court and confirmed that the Solicitor had appeared on the set date of this matter.

22nd September, 1993

Paul Hennessay - \$250

36. Paul Hennessay retained the Solicitor to represent him on a charge of mischief to public property. Mr. Hennessay met the Solicitor in his office where he gave him \$250 in cash and a post-dated cheque in the amount of \$250 for the remainder of the retainer.

37. The Solicitor appropriated the \$250 in cash for his own use and deposited the \$250 post-dated cheque into the firm's trust account.

38. The Solicitor successfully defended Mr. Hennessay. The solicitor had an account prepared on the basis of the \$250 payment made. A copy of the solicitor's March 9, 1992 account is attached as Exhibit 7 to this Agreed Statement of Facts. The full amount of the payments made by Mr. Hennessay were earned by the firm..

Restitution

39. The Solicitor provided a statement detailing the above noted appropriations to the Society on April 14, 1992. A copy of the Solicitor's statement is attached as Exhibit 8 to this agreed statement of facts.

40. The Solicitor has now made full restitution of all amounts appropriated, to Rosen, Fleming, to the satisfaction of the Law Society.

V. PRIOR DISCIPLINE

41. The Solicitor does not have a prior discipline record.

DATED at Toronto this 9th day of September, 1992."

RECOMMENDATION AS TO PENALTY

Your Committee finds the Solicitor guilty of professional misconduct and recommends that the Solicitor be suspended for a period of three months.

The Solicitor has continued in practice since the complaint was made pursuant to the terms of an undertaking given to the Society. Your Committee recommends that at the end of the period of suspension he be permitted to resume practice on the condition that he continue to comply with the following terms of the undertaking. These are to run for three years from the date of resumption of practice.

1. He is to practice only as the employee or employed associate of a member of the Law Society of Upper Canada, who is in good standing (hereinafter referred to as the "principal"). The principal must accept the responsibility of supervising him during the term of this undertaking.
2. That principal must be acceptable to Senior Counsel - Discipline. Senior Counsel - Discipline may unilaterally refuse to accept any proposed principal on the ground that the Society does not believe that the proposed principal would be a suitable supervisor.
3. He must make full disclosure to the principal of the complaint and decision of this Committee.
4. The Society will require the principal to sign an acknowledgement confirming that he or she is aware of the terms of this undertaking, and, assumes the responsibility to supervise the Solicitor.

22nd September, 1993

5. He must have no authority over or involvement in the trust account of his principal.
6. All clients must be given a written retainer document detailing that all payments for legal fees are to be paid directly to the principal or the principal's firm. Clients on Legal Aid retainers do not need to be given the written retainer.
7. He must not directly receive retainers from clients, whether cash or cheque. He must refer such clients to the principal's bookkeeper or some other member of the firm.
8. He must not sign fee billings on behalf of clients. He can prepare the fee billing, but it is to be executed by the principal or another lawyer with the firm.

In addition the Solicitor will pay the cost of the investigation of this matter fixed at \$1,500.00.

REASONS FOR RECOMMENDATION

The Solicitor admitted that he was guilty of professional misconduct. The only issue was penalty. The Society took the position that he should be suspended for one year. Counsel for the Solicitor took the position that he be suspended for not more than three months. Your Committee has agreed with counsel for the Solicitor.

In the normal case, the minimum penalty would be for a suspension for a much longer period, if not disbarment. There are, however, a great number of mitigating circumstances involved in this particular case, (1) the nature of the misconduct, (2) stress arising out of an intense but failed personal relationship, (3) the amount involved, and (4) restitution.

This was not a classic case of misappropriation. Money was taken from the firm in which he was employed. There was no defrauding or overcharging of clients. The service he provided to clients was of high quality. One of the partners of his former employer gave evidence. He stated that while there was no doubt the Solicitor should be punished, it was not a case for disbarment, and he asked the Committee to be lenient in considering suspension. He felt the law firm itself was partially to blame in failing to see the Solicitor's personal problems.

The Solicitor's personal problems arose out of the stress arising from a failed relationship with a woman, also a lawyer that lasted for several years. Of their mutual love there was no doubt. If they had married, however, both knew it would not work. He is Jewish. She is Catholic. His parents did not know of their relationship. She was not much interested in his cultural background which he could not bring himself to leave. They separated. He met and married a Danish woman of his own faith. He continued, however, to have contact with his former girlfriend and was quite ambivalent about his marriage. This has now been resolved and he is quite happy in his marriage. Unfortunately, it took these events to make him realize it.

The amount involved was small - \$5,600.00. He was being well paid and did not need the money that he took. The methods he adopted in taking it made discovery inevitable. He was almost asking to be found out and punished. He had a profound sense of relief when his actions were discovered.

There has been complete restitution.

22nd September, 1993

Your Committee considered whether or not a repetition of the conduct was likely and concluded, based on the evidence, that it was not. The factors that led to it have been removed. There is obvious shame and remorse. There was plenty of evidence of good character prior to the taking of the money and it appears that it was completely out of character. The Solicitor was discharged by his employers at the moment his actions were discovered. The Society did not take from him an undertaking not to practise. He sought and obtained new employment with a firm that is completely aware of the nature of his problems with the Society.

Your Committee briefly considered a more serious penalty than submitted to it but in the end came to the conclusion that it adopted.

Elyahu Doron Benaiah was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 10th day of April, 1986.

ALL OF WHICH is respectfully submitted

DATED this 3rd day of August, 1993

J. James Wardlaw, Q.C.
Chair

It was moved by Mr. Goudge, seconded by Mr. Hill that the Report of the Discipline Committee be adopted.

There were no submissions and the Report was adopted.

It was moved by Ms. Kiteley, seconded by Mr. Brennan that the Recommendation as to Penalty that is, that the solicitor be suspended for 3 months with conditions and pay costs in the amount of \$1,500, be adopted.

There were no submissions except that counsel for the solicitor requested a deferment of the commencement of the suspension to November 15th, 1993 to allow the solicitor time to provide for his family as his wife could not walk. Society's counsel had no objection.

Counsel, the solicitor, the reporter and the public withdrew.

It was moved by Mr. Goudge, seconded by Mr. Hill that the Recommendation as to Penalty be adopted and the commencement date of the suspension be November 15th, 1993.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision.

Counsel and the solicitor retired.

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RE: GERALD OLEH JARSON, Toronto

The Secretary placed the matter before Convocation.

The reporter was sworn.

Mr. Wardlaw withdrew.

22nd September, 1993

Mr. Stephen Foster appeared for the Society and Mr. Derek Freeman appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 21st July, 1993, together with an Affidavit of Service sworn 15th September, 1993 by Ronald Hoppie that he had effected service on the solicitor by registered mail on 20th August, 1993 (marked Exhibit 1) together with the Acknowledgment, Declaration and Consent signed by the solicitor 22nd September, 1993 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Kenneth E. Howie, Q.C., Chair
J. James Wardlaw, Q.C.
Earl J. Levy, Q.C.

In the matter of
The Law Society Act
and in the matter of

Stephen Foster
for the Society

GERALD OLEH JARSON
of the City
of Toronto
a barrister and solicitor

Derek R. Freeman
for the solicitor

Heard: June 16, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On December 17, 1992 Complaint D210/92 was issued against Gerald Oleh Jarson alleging that he was guilty of professional misconduct.

The matter was heard in public on June 16, 1993 before this Committee composed of Kenneth E. Howie, Q.C., Chair, J. James Wardlaw, Q.C. and Earl J. Levy, Q.C. Mr. Jarson attended the hearing and was represented by Derek R. Freeman. Stephen Foster appeared on behalf of the Law Society.

DECISION

The following particulars of professional misconduct were found to have been established:

Complaint D210/92

2. a) He misappropriated the following funds from his trust account:

i) between August 10, 1990 and June 14, 1991, amounts totalling \$22,397.79, more or less, which were subsequently replaced by the Solicitor by deposits of \$2,444.00 on November 30, 1990, \$8,000.00 on June 3, 1991, \$13,000.00 on June 12, 1991 and \$2,000.00 on July 2, 1991;

ii) between August 2, 1991 and May 7, 1992, amounts totalling \$24,200.00, more or less, which were subsequently replaced by the Solicitor by deposits of \$1,000.00 on February 13, 1992, \$1,080.00 on April 6, 1992 and \$27,000 on October 24, 1992.

b) He failed to maintain sufficient balances on deposit in his trust account to meet all his obligations with respect to monies held in trust for clients, in that as of July 9, 1992 there existed a deficit of \$26,426.58 in his trust bank account.

Evidence

Part of the evidence before the Committee contained the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor, Gerald Oleh Jarson, admits service of Complaint D210/92 and is prepared to proceed with a hearing of this matter on June 15 and 16, 1993.

II. IN PUBLIC/IN CAMERA

2. The parties agree that this matter should be heard in public pursuant to section 9 of the *Statutory Powers Procedure Act*.

III. ADMISSIONS

3. The Law Society agrees to seek leave to amend Complaint D210/92 to withdraw Particulars c) and d).

4. The Solicitor has reviewed Complaint D210/92 and admits particulars a) and b) contained therein. The Solicitor also admits that these particulars in the Complaint together with various of the facts hereinafter set out constitute professional misconduct.

IV. FACTS

Background

5. The Solicitor attended Royal Military College in Kingston and obtained an Honours Bachelor of Science (Mathematics and Physics) in 1962. Mr. Jarson obtained his Long Range Navigator's Wings in 1962 and completed his three years of flying duties with 436 Transport Squadron in Ottawa. After 1965 he served with the Royal Canadian Air Force Auxiliary, rising to the rank of Major, before he retired in 1989.

6. On October 7, 1967, Mr. Jarson married Susan Suhanic. Together they had two daughters and all live in Etobicoke, Ontario.

7. Mr. Jarson attended Osgoode Hall Law School from 1965 to 1968 and was called to the Bar in 1970. He articulated and then practised with the Hughes, Archer and Cooper firm in downtown Toronto until 1979. In that firm he initially practised family law and then moved into a corporate-real estate practice. In 1980 he opened his own practice in Etobicoke, where he continues to practise as a sole practitioner.

8. As set out under the heading "Mitigating Facts and Penalty" below, Mr. Jarson developed a serious alcohol problem in the mid 1980's which contributed to the following facts.

Complaint related Matters

9. Mr. Jarson was nine month's late in filing his Forms 2 and 3 for the fiscal year ending February 28, 1991 and the Law Society commenced an investigation pursuant to Section 18 of the Regulation 573 under the *Law Society Act*.

Particular a) - Misappropriation of \$22,397.79 (1990-1991) and \$24,200.00 (1991-1992)

10. The Law Society's examination disclosed a shortage in the Solicitor's trust account. Co-signing controls were placed on the trust account on June 11, 1992 and remain in effect.

11. The Law Society's examination also disclosed that the Solicitor had set up (since 1980) a miscellaneous account called "Jarson General", to handle small matters. In 1988 the Solicitor started using the system to handle trust matters as well. A copy of the Solicitor's "Jarson General" ledger from February 28, 1987 to May 7, 1992 is produced at Tab 1 of the Law Society's Book of Documents.

12. The Solicitor states that he made an initial deposit to the trust account in order to serve as a cushion against any overdraft trust ledger account balances which might occur.

13. However, the Solicitor began writing cheques to transfer funds from trust to general for which client references were not recorded. This most often occurred, prior to November 9, 1991, in situations where the Solicitor was intoxicated and was looking through his client's ledger cards to find available funds for transfer to the general account or simply to pay to himself. These transfers were subsequently posted by the bookkeeper to the "Jarson General" trust ledger. This resulted in a number of overdrawn balances in client trust ledger accounts and a general shortage in the Solicitor's trust account.

14. Between August 10, 1990 and June 14, 1991, the Solicitor misappropriated from his trust account amounts totalling \$22,397.79 through improper transfers posted to the "Jarson General" trust ledger.

15. The Solicitor replaced these funds (and some client trust ledger overdrafts) with deposits of capital funds of \$2,444.00 on November 30, 1990, \$8,000.00 on June 3, 1991, \$13,000.00 on June 12, 1991, and \$2,000.00 on July 2, 1991.

16. Between August 2, 1991 and May 7, 1992, the Solicitor misappropriated from his trust account amounts totalling \$24,200.00 through improper transfers posted to the "Jarson General" account.

17. The Solicitor replaced these funds (and some client trust overdrafts) by deposits of \$1,000.00 on February 13, 1992, \$1,080.00 on April 6, 1992, and \$27,000.00 on October 24, 1992.

Particulars b) - Failure to maintain sufficient balances in trust

18. As of July 9, 1992 there existed a deficit of \$26,426.58 in the Solicitor's trust bank account. That deficit is comprised of the outstanding balance of \$22,781.42 misappropriated by way of the "Jarson General" account as well as overdrawn balances in four other trust ledger accounts, as follows:

- a. \$157.75 shortage in "Visconti";
- b. \$359.71 shortage in "Clark";
- c. \$1,081.00 shortage in "Bonds";
- d. \$1,326.70 shortage in "Rakic".

Copies of the trust ledger accounts for Visconti, Clark, Bonds and Rakic are produced at Tabs 2, 3, 4 and 5 of the Law Society's Book of Documents.

19. These shortages were corrected by the deposits mentioned in paragraph 17 above.

20. These shortages were caused by the Solicitor making disbursements in excess of funds held in trust for these particular clients.

Additional Facts: The Beharry Matter

21. The Solicitor's misappropriation put Mr. and Mrs. S. Beharry at peril in respect of a mortgage re-financing.

22. The Beharrys had originally retained Mr. Jarson to handle the purchase of their condominium in 1990, with a vendor take back mortgage. That mortgage matured in 1992 and the Beharrys retained Mr. Jarson to assist them in respect of finding refinancing funds. The market value of the condominium had significantly declined, to \$116,500.00. Using his good relations with a loan officer of the Canadian Imperial Bank of Commerce (CIBC), in downtown Toronto, Mr. Jarson was able to arrange a 95% CMHC insured mortgage (at a lower rate) in the principal amount of \$110,700.00 and a personal loan of \$12,000.00 (totalling \$122,700.00) to pay out the existing mortgage of \$119,153.29.

23. The transaction was scheduled to close on February 28, 1992, which was extended to March 12, 1992. A copy of the Solicitor's "Discharge Statement" in respect of the transaction is produced at Tab 6 of the Law Society's Book of Documents.

24. On February 28, 1992 the closing funds totalling \$119,940.86 were received by the Solicitor and deposited in his trust account. This was posted to the Beharrys' client trust ledger account. A copy of the Beharrys client trust ledger account is produced at Tab 7 of the Law Society's Book of Documents.

25. At the time of this deposit, the Solicitor's trust account had a deficit of \$16,976.93. As well, on March 1, 1992 the Solicitor transferred a further \$7,000.00 from trust to his general account.

26. Upon the March 12, 1992 closing of the transaction, the Solicitor disbursed only \$100,0343.70 toward the discharge of the existing mortgage and \$200.00 to the mortgagee's solicitor, Mr. McKenzie, for his discharge fee. This disbursement was insufficient to discharge the mortgage and left a short-fall as of March 16, 1992 of \$19,393.88 which included per diem interest to that date.

27. On April 2, 1992 Mr. McKenzie wrote to the Solicitor to advise that he had received instructions to commence Power of Sale proceedings within two weeks, if full payment was not received.

22nd September, 1993

28. On April 16, 1992 the Solicitor disbursed another \$8,000.00 to Mr. McKenzie, leaving a balance owing of \$11,393.88, plus interest.

29. The Solicitor did not report any of this to his clients, the Beharrys.

30. The Beharrys eventually learned of the situation from Mr. McKenzie when he wrote to them in early June, 1992 advising that he would be commencing a sale action to take possession of their home. Mr. Beharry telephoned Mr. McKenzie advising that he had understood that the mortgage had been paid in full.

31. By letter dated June 24, 1992, Mr. McKenzie confirmed his conversation with the Solicitor wherein the Solicitor advised that the shortfall in his trust account was due to monies paid out in error to another party. Mr. McKenzie suggested that the Solicitor report the matter to the Law Society. A copy of Mr. McKenzie's June 24, 1992 letter is produced at Tab 8 of the Law Society's Book of Documents.

32. On June 26, 1992, the Solicitor wrote to Mr. McKenzie enclosing a cheque from his general account to the mortgagee for \$1,500.00 and a cheque from his general account to Mr. McKenzie for \$250.00. The solicitor advised Mr. McKenzie that he was unable to pay the outstanding mortgage balance. A copy of the Solicitor's June 26, 1992 letter to Mr. McKenzie is produced at Tab 9 of the Law Society's Book of Documents.

33. On the same date, the Solicitor wrote to his clients, the Beharrys, suggesting that they consult another lawyer about a claim against him and enclosing a cheque from his general account for \$200.00 to assist with additional legal fees which they might incur in obtaining legal advice regarding the situation. A copy of the Solicitor's June 26, 1992 to the Beharrys is produced at Tab 10 of the Law Society's Book of Documents.

34. By letter dated June 29, 1992 Mr. McKenzie advised the Law Society of the Solicitor's conduct in this matter. A copy of Mr. McKenzie's June 29, 1992 letter to the Law Society is produced at Tab 11 of the Law Society's Book of Documents in this matter.

35. During the summer of 1992, due to his poor financial situation, Mr. Jarson's own house was put into power of sale proceedings. To pay out the monies owing to his clients and to set right his own mortgage situation, Mr. Jarson obtained financing through a mortgage broker. By also borrowing from family members (upon the advice of his solicitors), he was able to make good all monies due to the Beharry's and to his clients' trust accounts, as referred to above. The Beharrys have never complained to the Law Society.

Additional Facts: Undertakings to the Law Society

36. On June 2, 1992, during the Society's examiner's first visit to the Solicitor's office, the Solicitor provided a written undertaking to "... to replace the uncorrected overdrawn trust ledger accounts in existence as of March 31st 1992, as recorded on the trust listing of the same date, by June 8th 1992" and to "... investigate and record and explain the trust transfer entries currently recorded on the trust ledger entitled 'Jarson General'". A copy of the Solicitor's undertaking of June is produced at Tab 12 of the Law Society's Book of Documents.

37. On June 8, 1992 the undertaking had not been fulfilled. The Solicitor, still optimistic that he could obtain secondary financing on his home, advised the Law Society that \$23,000.00 was to be deposited in the trust account by June 10, 1992 or June 11, 1992. He stated that he was obtaining a loan from Canada Trust and that it would not advance the funds without security which was taking some time to arrange.

38. On June 8, 1992 the Solicitor gave the Law Society a further written undertaking to "replace the uncorrected overdrawn trust ledger accounts in existence as of April 30, 1992, as recorded on the trust listing of the same date, by Thursday June 11th 1992." A copy of the Solicitor's June 8, 1992 undertaking to the Law Society is produced at Tab 13 of the Law Society's Book of Documents.

39. Due to his desperate financial situation Mr. Jarson was unable to obtain the necessary funds and therefore did not comply with his undertaking to the Law Society.

40. On October 30, 1992 the Solicitor advised that he had replaced the monies overdrawn from his trust account on October 23, 1992 and he provided the Society with a bank deposit receipt to that effect.

V. DISCIPLINE HISTORY

41. The Solicitor has no previous discipline record.

VI. MITIGATING FACTS AND PENALTY

42. From about 1985 to November 9th, 1991 the Solicitor started an ever increasing abuse of alcohol. By about 1988 this made many parts of his life unmanageable, especially given his financially worsening position (principally caused by the recession's impact on his real estate and commercial practice) and a severe family crisis.

43. The solicitor lost control over his drinking and frequently drank at his office. He became undisciplined in his business affairs and started losing money in the law practice. One of the symptoms of the disease of alcoholism is false pride. That pride and his sense of shame prevented Mr. Jarson from approaching his wife, a very supportive person, soon enough to avert the disaster that occurred. When he did approach her, he did not reveal the full extent of his financial troubles, unrealistically hoping that things would change for the better.

44. This behaviour of the solicitor precluded the whole family's resources being properly utilized. With proper (and simple) planning, at any time during 1989 to 1992, the solicitor could have easily avoided what befell him by refinancing their house. If in dire straits, he could have borrowed from his wife's family, which in fact he and his wife later did, in late 1992. As each opportunity presented itself, his sense of shame at having failed his family, and the other effects of his increased drinking, prevented Mr. Jarson from doing the sensible thing.

45. Starting in 1990, Mr. Jarson started taking money from trust accounts where he thought the clients owed him the money. As his daily drinking increased, and his financial situation worsened, he became careless and then reckless in respect of taking the money.

46. In November, 1990, Mr. Jarson's eldest daughter suffered catatonic depression and she had to leave her University. The depression continued for about six months, during which she became totally dysfunctional. The effect on the family was extremely disruptive. Mr. Jarson's drinking worsened and his ability to cope with day-to-day matters further decreased.

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47. Mr. Jarson realized he had a serious drinking problem and in both 1990 and 1991 he started to try to get assistance from OBAP (Ontario Bar Alcoholism Programme), having read their advertisement in the Ontario Reports. Each time he called the OBAP number, his fear caused him to hang up when he was asked for his name and telephone number.

48. Finally, on November 9, 1991, while intoxicated, he at last told the OBAP operator his name and number. He immediately received assistance from a lawyer in OBAP, who guided him into Alcoholics Anonymous. That was the last day that he drank alcohol.

49. Regrettably the Solicitor did not fully follow the programme of Alcoholics Anonymous and while he did not drink alcohol anymore, he did not start adequately addressing the root problems of his alcoholism. His imprudent behaviour in the running of his law practice continued and he took further monies. The last monies were taken in the month of May, 1992.

50. Finally, in 1993, he listened to advice from friends also in the A.A. programme and he started to completely follow the steps recommended in the programme. He has been referred to the Saint Mary's Rehabilitation Centre in Minneapolis, Minnesota and has spent one month in their care. He is also attending A.A. meetings on a regular basis, several times a week. He has changed and has a more balanced view of life. He is being fully supported by his family. Mr. Jarson is also fully co-operating with Staff Trustee in winding down his practice.

51. The parties make the following joint submission in respect of penalty:

The Solicitor respectfully asks, and the Law Society recommends that, the Solicitor be permitted to resign, without prejudice to his right to ask for re-admittance, in the future.

VII. COSTS

52. The Solicitor agrees to pay the Law Society's costs in the amount of \$2,000.00 in this matter. The Solicitor agrees to pay these costs within 90 days of June 30, 1993.

VIII. INDEPENDENT LEGAL ADVICE

53. The Solicitor has read the above statement and agrees that it is accurate. He acknowledges that he has received legal advice from his counsel, Derek R. Freeman, of Chappell, Bushell, Stewart, in Toronto, and that he is signing this document voluntarily.

DATED at Toronto this 16th day of June, 1993."

RECOMMENDATION AS TO PENALTY

The Committee accepts the joint submission that the Solicitor be granted permission to resign.

REASONS FOR RECOMMENDATION

The Solicitor presented fourteen impressive testimonial letters from other solicitors and members of the public, including clients who were aware of his difficulties with the Law Society and would still have him as their solicitor. These letters speak of the Solicitor as being "a competent, conscientious and caring lawyer", "highly regarded by the people for whom he acted", "exemplary in his professional dealings and without blemish in any financial or business dealings", "the epitome of discipline and honesty", "he is not only honest, he is exceptionally honest", "deeply involved in charity work through Kiwanis Club", "a man of substantial legal skills and a remarkable degree of integrity", "a devoted family man" and a long standing member of the RCAF Reserves. A number of those who wrote remarked that the Solicitor's defalcations were completely out-of-character.

A medical report was also filed authored by Dr. Maris Andersons who has excellent credentials particularly in the field of substance abuse. The doctor traced the Solicitor's alcohol abuse from 1985 to 1991 linking his clouded thinking processes to his misappropriations. During this period of time the Solicitor's eldest daughter suffered a severe depression and she had to leave university. She became dysfunctional adding to the Solicitor's depression. In 1991 the Solicitor attended Alcoholics Anonymous and although not totally successful at first he later complied with a treatment programme at St. Mary's Rehabilitation Centre in Minneapolis, Minnesota where he spent one month in care and recovery. Dr. Anderson has seen the Solicitor on three occasions between May 25th, 1993 and June 11th, 1993 and noted his strong family support, his sensitive, kind and caring nature and his remorse for his unethical behaviour. The doctor sees the Solicitor as being enmeshed in strong after care recovery and notes that he has undertaken to be monitored by the doctor and his two sponsors in A.A. The doctor is very pleased with the Solicitor's recovery and his prognosis is viewed as excellent.

Having regard to the above-mentioned factors, the mitigating facts as set out in paragraphs 42 to 50 in the Agreed Statement of Facts and the repayment of misappropriated monies by the Solicitor, this Committee agrees with the joint submission by the Solicitor and the Law Society that the Solicitor be permitted to resign, without prejudice to his right to request re-admittance in the future.

Gerald Oleh Jarson was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 19th day of March, 1970.

ALL OF WHICH is respectfully submitted

DATED this 21st day of July, 1993

Earl J. Levy, Q.C.

It was moved by Ms. Kiteley, seconded by Mr. Brennan that the Report of the Discipline Committee be adopted.

There were no submissions and the Report was adopted.

It was moved by Mr. Goudge, seconded by Mr. Brennan that the Recommendation as to Penalty, that is that the solicitor be permitted to resign and pay costs of \$2,000, be adopted.

Both counsel made submissions in support of the Recommendation as to Penalty.

Counsel, the solicitor, the reporter and the public withdrew.

The Recommendation as to Penalty was adopted.

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision. The signed Resignation was filed as Exhibit 3.

Counsel and Mr. Jarson retired.

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RE: JOHN MOWAT JAFFEY, Mississauga

The Secretary placed the matter before Convocation.

The reporter was sworn.

Messrs. Hickey, Brennan and Wardlaw withdrew.

Ms. Christina Budweth appeared for the Society and Mr. W. Bruce Drake appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 19th August, 1993 together with an Affidavit of Service sworn 15th September, 1993 by Ronald Hoppie that he had effected service on the solicitor by registered mail on 25th August, 1993 (marked Exhibit 1) together with the Acknowledgement, Declaration and Consent signed by the solicitor 22nd September, 1993 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Michael G. Hickey, Q.C. Chair
Lloyd Brennan, Q.C.
J. James Wardlaw, Q.C.

In the matter of
The Law Society Act
and in the matter of

Christina Budweth
for the Society

JOHN MOWAT JAFFEY
of the City
of Mississauga
a barrister and solicitor

W. Bruce Drake
for the solicitor

Heard: April 7, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On October 23, 1992, Complaint D171/92 was issued against John Mowat Jaffey alleging that he was guilty of professional misconduct. This Complaint was withdrawn and replaced with Complaint D171a/92 issued on February 24, 1993.

The matter was heard in public on April 7, 1993 before this Committee composed of Michael G. Hickey, Q.C., Chair, Lloyd Brennan, Q.C. and J. James Wardlaw, Q.C. Mr. Jaffey attended the hearing and was represented by W. Bruce Drake. Christina Budweth appeared for the Society.

DECISION

The following particulars of professional misconduct were admitted and found to have been established:

- 2.a) While acting as the executor and solicitor of the estate of Gordon Garbutt he:
 - i) he acted in a conflict of interest by acting for both the estate, as borrower and his client, David Green, as lender in respect of two mortgage transactions in the amounts of \$30,000 and \$70,000;
 - ii) he failed to diligently and conscientiously serve the estate and its beneficiaries by failing to complete the administration of the estate in a timely fashion and by failing to report to the beneficiaries of the estate;
 - iii) he withdrew a total of 28,567.70 from the estate for legal fees, executor's compensation and brokerage fees which amount was excessive in all of the circumstances;
 - iv) he preferred his own interests over those of the estate and its beneficiaries by encumbering the estate property to enable him to be paid executor's fees, legal fees, and brokerage fees;
 - vi) he failed to diligently and conscientiously serve the estate by failing to properly investigate and verify charges rendered to the estate by its principal residual beneficiary, John Barton, in respect of expenses for the renovation and maintenance of the estate's primary asset being a home at 39 Unsworth Avenue, Toronto;
 - vii) he preferred the interests of one beneficiary over the others by making early distribution of the estate to Marjorie Cooper (Barton) without informing or receiving the authority of the other beneficiaries; and
 - viii) he failed to co-operate with the Law Society in its investigation into his conduct regarding the estate by failing to verify the disposition of the personalty of the estate despite requests that he provide this information.

- b) He has failed to maintain books and records in accordance with the provisions of sections 14 and 15 of Regulation 573 under the Law Society Act.

Evidence

Part of the evidence before the Committee contained the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D171a/92 and is not prepared to proceed with a hearing of this matter on March 2 and 3, 1993.

II. IN PUBLIC/IN CAMERA

2. The parties agree that this matter should be heard in public pursuant to Section 9 of the Statutory Powers Procedure Act.

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D171a/92 and this agreed statement of facts with his counsel, W. Bruce Drake and admits the particulars contained in the complaint. The Solicitor further admits that these particulars as supported by the facts hereinafter constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the bar in 1975. He practises in partnership with one other solicitor. The Solicitor's practice is general in nature with an emphasis on the areas of real estate and family law.

Particular 2(b) - Failure to Maintain Books and Records

5. A Society examiner attended at the Solicitor's office on July 19, October 29, November 6 and November 9, 1990. A review of the firm's books and records revealed the following inadequacies:

- 1. Bank reconciling items were allowed to go uncorrected for a period in excess of one month;
- 2. Staledated trust cheques were used to reconcile the mixed trust account; and
- 3. Trust cheques were made payable to cash.

Particular 2(a) - Estate of Gordon Garbutt

Background

6. Gordon Garbutt died on December 11, 1989. Mr. Garbutt's will dated March 2, 1987, named the Solicitor as the sole executor and trustee of his estate.

7. Mr. Garbutt's will made bequests to the following institutions and individuals:

1	University of Toronto-Dentistry in memory of Dr. Cummer	\$ 5,000.00
2	Humber Valley United Church	\$10,000.00

3	Mrs. S. Webster (formerly Gertie Cunningham)	\$ 5,000.00
4	Mr. & Mrs. Cunningham or survivor per stirpes	\$ 5,000.00
5	Mr. & Mrs. Steve Biro or survivor	\$ 5,000.00
6	Mrs. A. Cooper (also known as Marjorie Barton)	\$10,000.00
7	Dr. Robert W. Watt, per stirpes	\$10,000.00
8	Joseph Spoto	\$ 5,000.00
	Total Amount of Bequests	\$55,000.00

The residual beneficiaries were:

Mr. & Mrs. Tom Harris (friend)	20%
Mr. John Barton or survivor (relative) per stirpes	80%

8. Letter of probate were issued March 28, 1990. The major asset of the Garbutt estate was a property at 39 Unsworth Avenue, Toronto. The application for probate valued this property at \$270,000. This value was based on a letter of opinion from Royal LePage dated January 5, 1990. Copies of the application for probate and the letter of opinion from Royal lePage are attached collectively as Exhibit 1 to this agreed statement of facts.

9. Mr. Garbutt's personal property was valued at \$29,500 on the probate application. At the time of Mr. Garbutt's death his bank contained only \$802.09. Monies owing to Mr. Garbutt totalled \$1,548.99. Accordingly, the \$29,500 figure of personal worth was an overstatement.

10. John Barton, the Garbutt estate's principle residual beneficiary performed some renovation on the estate property to ready it for sale. The Solicitor wrote to the Toronto-Dominion Bank by letter dated January 23, 1990, undertaking to repay a loan sought by Mr. Barton to complete the repair work. A copy of the Solicitor's January 23 letter is attached as Exhibit 2 to this agreed statement of facts.

11. 39 Unsworth Avenue was listed for sale on February 10, 1990 at \$289,000. No offers were received. The list price was reduced to \$275,000 on April 4, 1990. It was further reduced to \$268,000 on May 29, 1990, still no offers were received.

Particular 2(a)(i) - Conflict of Interest

12. The amount of money in Mr. Garbutt's bank account was inadequate to administer the estate and pay debts such as funeral expenses, Mr. Barton's loan to the Toronto-Dominion Bank and expenses to maintain the estate property.

13. As a result, the Solicitor contacted David Green, a client, to obtain a loan for the estate. Mr. Green agreed to lend the estate \$30,000 at 15% secured by a first mortgage on the estate property which was a reasonable commercial rate. The Solicitor did not disclose to Mr. Green that he was the solicitor and sole executor of the Garbutt estate, nor did the Solicitor advise Mr. Green to obtain independent legal advice. The Solicitor did not obtain an acknowledgement and consent from Mr. Green acknowledging his representation of the interests of both parties in the mortgage transaction. Mr. Green was an experienced lender and businessman and if there had been a loss to him he would not have held the Solicitor responsible.

14. The Toronto-Dominion Bank loan which totalled \$7,579.89 with accrued interest was repaid on April 10, 1990 from the first Green loan.

Particulars 2(a)(iii) and (iv) - Solicitor's Compensation

15. Shortly after receipt, the Solicitor transferred \$18,150 of the Green mortgage proceeds to his general account. Of this sum, \$3,200 was applied to an outstanding balance remaining from the bill for legal fees dated April 3, 1990, a copy of which is attached as Exhibit 3 to this agreed statement of facts. The Solicitor rendered a further account for executor's compensation dated April 9, 1990 in the amount of \$14,950. A copy of the executor's account is attached as Exhibit 4 to this agreed statement of facts.

16. In the account of April 9, 1990 for executor's compensation, the Solicitor charged the estate for the following services which were not performed:

- a) To attending to the transfer and liquidation of the other assets of the Estate and transferring them to the beneficiaries.
- b) To keeping and preparing accounts, listing and valuing assets and liabilities.
- c) To safekeeping and disposing of assets.
- d) To distribution to beneficiaries.
- e) To preparing and filing deceased taxpayer return and trust return.

17. The Solicitor drew a further \$1,800 in fees in relation to listing and leasing the estate property in the fall of 1990, a copy of that account is attached as Exhibit 5 to this agreed statement of facts.

18. The Solicitor charged the estate \$481.50 in September, 1991 in connection with a lease renewal.

19. The \$30,000 mortgage was extended for one further year from April, 1990 to April, 1992 with the same terms and conditions.

Particular 2(a)(i) and (vi)

20. In October, 1991, John Barton submitted an account in the amount of \$41,041.25 for renovating the estate property. In addition, one of the beneficiaries, Marjorie Cooper (Barton) was pressing the Solicitor for distribution of her bequest in the amount of \$10,000.

21. As a result, the Solicitor sought new mortgage financing. The Solicitor advised Mr. Barton of his need to do so but did not advise him of the amount of the proposed mortgage.

22. Again the mortgage lender was Mr. Green. He agreed to lend an additional \$70,000 at 12.25% in October, 1991. Mr. Green took this mortgage in the name of his corporation, St. Regis Holdings Ltd. A copy of the reporting letter to Mr. Green on this mortgage as well as a letter confirming the extension of the first mortgage is attached as Exhibit 6 to this agreed statement of facts.

23. Out of the proceeds of this mortgage, Mr. Barton was paid the sum of \$41,041.25 in accordance with the bill of costs referred to in paragraph 20. Included in this bill was a charge of \$18,200 for "renovation hourly charges" as well as an amount of \$5,430.63 for the Toronto-Dominion Bank loan which had already been paid out of the proceeds of the first Green loan (refer to paragraph 14 above). A copy of the bill complete with enclosures is attached as Exhibit 7 to this agreed statement of facts.

24. The Solicitor did not verify any of the charges referred to in Exhibit 7. The Solicitor now admits that a number of the charges detailed in Exhibit 7 are excessive including the travel and auto expenses as well as the hourly renovation charges.

Particular 2(a) (vii) - Marjorie Cooper

25. The Solicitor paid \$10,000 to Marjorie Cooper from the second Green mortgage proceeds in accordance with a bequest made to her in the will. Mrs. Cooper's husband had died and she was destitute.

26. The Solicitor did not seek or receive the approval of any of the beneficiaries before or after making this payment.

Particular 2(a) (iii) - Solicitor's Fees

27. On October 18, 1991, the Solicitor billed and took an additional \$843.35 from the estate in connection with the second mortgage. On the same date he billed and received from the estate \$2,996 for brokerage fees on the second mortgage.

28. Lease payments received from the tenants proved insufficient to cover payments on both the first and second mortgages. Accordingly, the Solicitor consolidated the first and second mortgages in May 1992 into a single mortgage for \$100,000. For this the Solicitor drew a brokerage fee of \$1,000 and legal fees of \$946.85 from the estate.

29. The following schedule details the Solicitor's drawings from the estate (legal fees, executor's compensation and mortgage broker's fees) (Refer also to paragraph's 15-18)

Apr 3/90	\$ 2,350.00	legal fees
Apr 9/90	18,150.00	legal fees (\$3,200.00)
		executor's compensation
		(\$14,950.00)
Dec 3/90	1,000.00	legal fees
Feb 14/90	800.00	legal fees
Sept 27/91	481.50	legal fees
Oct 18/91	843.35	legal fees
Oct 18/91	2,996.00	mortgage brokerage fees
May 7/92	946.85	legal fees
May 7/92	1,000.00	brokerage fees
TOTAL	\$28,567.70	

Particular 2(a)(viii) - Failure to Co-operate

30. The Solicitor was asked by the Society examiner on August 28, 1992 to provide a list of assets and liabilities of the estate. The Solicitor replied that he would attend to this matter and provide the information but that he would require time to do so. The Solicitor has not, to date, provided the information.

Particular 2(a)(v) - Failure to Violation of Charities Accounting Act

31. As stated in paragraph 7 of this agreed statement of facts the University of Toronto-Dentistry Program and Humber Valley United Church were beneficiaries of Mr. Garbutt's estate. The Charities Accounting Act requires that the public trustee be notified of a charitable bequest within one month of the date of death of the deceased. The Solicitor failed to make this report.

Particular 2(a)(ii)

32. The Solicitor corresponded with Mr. and Mrs. Biro regarding their right of first refusal to purchase the property at 39 Unsworth Avenue and responded to a request made to Mr. and Mrs. Harris on April 9, 1990 to receive a copy of the will. As noted above Marjorie Cooper and Mr. Barton are also aware of the bequests to them. There is no evidence that the remainder of the beneficiaries have been notified of their entitlements under the will. Further, the Solicitor failed to report to the Biro's, the Harris' and Marjorie Cooper on the developments in the administration of the estate as detailed above.

33. The Solicitor has yet to prepare income tax returns for the estate.

DATED at Toronto this 26th day of February," 1993.

RECOMMENDATION AS TO PENALTY

The Committee recommends that John Mowatt Jaffey be reprimanded in Convocation and that he pay the costs of the Society in the amount of \$3,000.00.

REASONS FOR RECOMMENDATION

The professional misconduct of the Solicitor may be characterized in general as mismanagement of an estate. There was no evidence of dishonesty or misappropriation of funds.

The Solicitor has co-operated with the Society in rectifying the matters that are the subject of the complaint and formulating a plan which will allow the administration of the estate to be completed and the beneficiaries looked after. In addition, the Solicitor has paid \$10,000.00 into a separate interest bearing account controlled by his counsel as a reserve for any amount that is adjudged to be owing to the estate after the assessment of the Solicitor's accounts.

The Solicitor has had an unblemished career of fourteen years at the Bar and has had no other discipline involvement.

The Solicitor has also made arrangements through the Bar Admission Course to attend the seminar on Wills and Estates in December this year.

In all of the circumstances the Committee is of the view that the joint submission of counsel for the Solicitor and the Society for a reprimand in Convocation and that the Solicitor be ordered to pay the costs of the Society in the amount of \$3,000.00 is the appropriate penalty in this case.

22nd September, 1993

John Mowatt Jeffery was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 20th day of March, 1975.

ALL OF WHICH is respectfully submitted

DATED this 19th day of August, 1993.

Michael G. Hickey, Q.C.
Chair

It was moved by Ms. Kiteley, seconded by Ms. Sealy that the Report of the Discipline Committee be adopted.

There were no submissions and the Report was adopted.

It was moved by Mr. Goudge, seconded by Ms. Palmer that the Recommendation as to Penalty that is, that the solicitor be reprimanded in Convocation and pay the costs of \$3,000, be adopted.

There were submissions by both counsel in support of the Recommendation.

There were questions from the Bench.

Counsel, the solicitor, the reporter and the public withdrew.

The Recommendation as to Penalty was adopted.

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision.

The solicitor was reprimanded in Convocation.

Counsel and solicitor retired.

.....

RE: PING KWAN TAM, Toronto

The secretary placed the matter before Convocation.

The reporter was sworn.

Ms. Sealy withdrew.

Mr. Stephen Foster appeared for the Society and the solicitor appeared on his own behalf.

The Report and Acknowledgement were filed as Exhibits at the Special Convocation on June 24th.

Counsel for the Society addressed Convocation and advised that the solicitor had not taken adequate steps to comply with the Committee's recommendation and asked that the solicitor be suspended for 1 month and thereafter until all outstanding matters were completed.

There were questions from the Bench.

22nd September, 1993

The matter was adjourned to Regular Convocation on Friday, September 24th in order to obtain a status report from the auditor.

Both counsel waived the requirements for a quorum composed of those Benchers present in Convocation.

Counsel and solicitor retired.

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RE: PETER MICHAEL HOLLYOAKE, Burlington

The Secretary placed the matter before Convocation.

The reporter was sworn.

Mr. Goudge and Ms. Kiteley withdrew.

Mr. Neil Perrier appeared for the Society. The solicitor appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 14th May, 1993, together with an Affidavit of Service sworn 11th June, 1993 by Louis Katholos that he had effected service on the solicitor by registered mail on 21st May, 1993 (marked Exhibit 1) together with the Acknowledgement, Declaration and Consent signed by the solicitor 22nd September 1993 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Stephen Goudge, Q.C.
Stuart Thom, Q.C.
Netty Graham

In the matter of
The Law Society Act
and in the matter of

Neil Perrier
for the Society

PETER MICHAEL HOLLYOAKE
of the City
of Burlington
a barrister and solicitor

Not Represented
for the solicitor

Heard: November 24, 1992
April 8, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On March 16, 1992, Complaint D29/92 was issued against Peter Michael Hollyoake alleging that he was guilty of professional misconduct.

The matter was heard in public on September 30 and November 24, 1992 and finally, after an adjournment on February 3, 1993 due to Mr. Hollyoake's illness, was concluded on April 8, 1993 before this Committee composed of Stephen T. Goudge, Q.C., Chair, Stuart Thom, Q.C. and Mrs. Netty Graham. Mr. Hollyoake attended the hearing and was not represented. Neil Perrier appeared on behalf of the Law Society.

DECISION

Five particulars of professional misconduct were identified in the Complaint. They are as follows:

2. a) He failed to serve his client, Julie Hudson, in a conscientious, diligent and efficient manner by his failure to provide an accounting and a report on the sale of Ms. Hudson's property;
- b) He failed to reply to the Law Society with respect to the ongoing investigation of a complaint by Julie Hudson, despite letters dated September 3, 1991 and November 4, 1991 and telephone messages left on October 2, 1991 and October 7, 1991;
- c) He failed to serve his client, Montreal Trust, in a conscientious diligent and efficient manner by his failure to provide the client with a complete report upon completion of a mortgage transaction;
- d) He failed to file with the Law Society within six months of the termination of his fiscal years ending April 30, 1990 and April 30, 1991, a statutory declaration in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the rules thereby contravening Section 16(2) of the regulation made pursuant to the Law Society Act;
- e) He failed to cooperate with the Law Society in an investigation in that he failed or refused to allow a review of his books and records.

At the end of the hearing on November 24, 1992, the Committee was satisfied that the allegations of professional misconduct set out in paragraphs (2), (b), (d) and (e) above had been established and that the allegation set out in paragraph (c) above had not been established.

The Committee reconvened on April 8, 1993 to hear evidence and submissions concerning penalty. The Committee's recommendation, as set out later in this report, was delivered at the conclusion of that day.

REASONS FOR FINDING OF PROFESSIONAL MISCONDUCT

Particular (a)

The facts relating to this particular, arise from a real estate transaction in which the house belonging to Ms. Julie Hudson and her husband, Clark Hudson, was sold. The sale closed in June, 1990. The Law Society alleged that the Solicitor failed to provide Ms. Hudson with an accounting and a report on the sale of this property. The Solicitor acknowledged that he did not provide a full accounting nor a report on the sale. His defence was that Ms. Hudson was not his client.

In the Committee's view, this defence could not be sustained on the evidence. The Solicitor acted as the solicitor for the vendors in the transaction. As such he was legally responsible for conveying the interest Ms. Hudson had in the property. Mr. Hudson attended at his office to sign documents in connection with the transaction. The Solicitor's fees for services in the transaction were taken off the top of the proceeds of the sale, in effect resulting in Ms. Hudson paying a portion of his account. In these circumstances, the Committee concluded that the Solicitor had acted in this transaction as Solicitor for Ms. Hudson and, therefore, his failure to provide a proper accounting or a report on the sale of the property to her constituted professional misconduct as alleged.

Particular (b)

In connection with this particular, the Solicitor acknowledged failing to reply to the letters and telephone messages particularized in the complaint. His defence was that these letters and telephone messages concerned the dispute over his failure to provide Ms. Hudson with the accounting and report referred to above and that his difference of opinion with the Law Society, based on his assertion of not acting for Ms. Hudson, was well known to the Law Society.

In the Committee's view, this defence failed. His professional obligation remained that of providing a response to the letters and telephone messages referred to despite the difference of view concerning his professional relationship with Ms. Hudson. This violation, although relatively technical and, in fact, preceded by other correspondence in which the Solicitor did respond to the Law Society, is made out.

Particular (c)

The Law Society's evidence on this particular was that the Solicitor had failed to provide certain documentation to his client, Montreal Trust, upon completion of a mortgage transaction. The Solicitor's defence was that he had in fact delivered the necessary documentation and that the client must have misplaced the information. The Solicitor's wife gave evidence which was consistent with this explanation.

The Committee concluded that it was unable to say, on the clear and cogent basis required, that this particular had been made out.

Particular (d)

The Solicitor admitted the particulars of this complaint and hence the Committee found it to be made out.

Particular (e)

The Law Society called evidence demonstrating that the Solicitor had, throughout, failed to give access to the Law Society's audit staff to conduct a spot audit. The Solicitor's defence to this particular was an assertion that some of the material requested could not be part of a spot audit.

The Committee was not able to accept this defence nor the apparent rationale behind it. In the Committee's view, on a spot audit, the audit staff is entitled to look at all books and records of the Solicitor. This particular was, therefore, found to have been made out.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Peter Michael Hollyoake be suspended from practice for one month, the suspension to continue thereafter until:

- (a) the Solicitor provides an accounting and a report to Ms. Hudson on the sale of her property;
- (b) the Solicitor completes his annual filing requirements for the year ends April 30, 1990 and April 30, 1991;
- (c) the Solicitor pays the required late filing fee of \$1,500.00;
- (d) the Solicitor produces his books and records for the audit staff of the Law Society.

REASONS FOR RECOMMENDATION

When the matter came before the Committee for evidence and submissions concerning penalty on April 8, 1993, the Law Society requested a suspension of three to six months with the suspension to run thereafter until the fulfilment of the above conditions and, in addition, the payment of costs in the amount of \$2,500.00.

The Committee heard considerable evidence from Mr. Hollyoake as to his personal and family circumstances. It is clear that he has suffered from the death of his father in 1991 and the family turmoil, including bitter litigation, that this produced. His immediate family circumstances, including the behaviour of his teenage step-daughter and the recent birth of his child have also created great stress for him.

The Committee was further conscious that the Solicitor does not now have and has not had for some time an active practice, but has rather relied on other commercial activities to provide his income.

The Committee's view was that the particulars of misconduct made out, while real, represented more of a threat to the Solicitor's governability than to the public through solicitor dishonesty.

Finally, the Committee is conscious that this is the Solicitor's second brush with discipline in that he was reprimanded in Convocation as a result of a Committee report of November 18, 1991. The Committee did note that the events which were the subject of the complaints before it preceded his prior discipline.

In all the circumstances, the Committee concluded that the appropriate discipline was that recited above.

22nd September, 1993

Peter Michael Hollyoake was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 9th day of April, 1976.

ALL OF WHICH is respectfully submitted

DATED this 14th day of May, 1993

Stephen T. Goudge, Q.C.
Chair

It was moved by Mr. Brennan, seconded by Ms. Palmer that the Report of the Discipline Committee be adopted.

There were no submissions and the Report was adopted.

It was moved by Ms. Sealy, seconded by Ms. Lax that the Recommendation as to Penalty that is, that the solicitor be suspended for 1 month with conditions, be adopted.

Counsel for the Society made submissions in support of the recommended penalty.

There were questions from the Bench.

Counsel, the solicitor, the reporter and the public withdrew.

It was moved by Mr. Cullity, seconded by Ms. Palmer that the solicitor comply with the requirements (a), (b) and (c) set out at page 6 of the Recommendation as to Penalty by the November Special Convocation failing which the solicitor would be disbarred.

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision.

The solicitor requested an adjournment for 1 month.

Counsel, the solicitor, the reporter and the public withdrew.

It was moved by Mr. Cullity, seconded by Mr. Brennan that the matter be adjourned for 1 month peremptory to October.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision.

Counsel and the solicitor retired.

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RE: FRANCIS LEWIS REILLY, St. Catharines

The Secretary placed the matter before Convocation.

The reporter was sworn.

Ms. Lax withdrew.

Mr. Neil Perrier appeared for the Society and the solicitor appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 18th August, 1993, together with an Affidavit of Service sworn 15th September, 1993 by Ronald Hoppie that he had effected service on the solicitor by registered mail on 20th August, 1993 (marked Exhibit 1) together with the Acknowledgement, Declaration and Consent signed by the solicitor 22nd September, 1993 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Thomas G. Bastedo, Chair
Joan L. Lax
Stuart Thom

In the matter of
The Law Society Act
and in the matter of

Neil Perrier
for the Society

FRANCIS LEWIS REILLY
of the City
of St. Catharines
a barrister and solicitor

Not Present nor Represented
for the solicitor

Heard: May 18, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

On January 23, 1993 Complaint D36/93 was issued and on March 16, 1993 Complaint D74/93 was issued against Francis Lewis Reilly alleging that he was guilty of professional misconduct.

The matter was heard in public on May 18, 1993 before this Committee composed of Thomas G. Bastedo, Chair, Joan L. Lax and Stuart Thom. Mr. Reilly was not in attendance. Neil Perrier appeared on behalf of the Law Society.

DECISION

The following particulars of professional misconduct were found to have been established:

Complaint D36/93

- 2. 2) He failed to provide a reply to the Law Society regarding a complaint by Brian C. Wilcox despite letters dated October 9, 1992 and November 30, 1992, and telephone requests on November 11, 1992, November 17, 1992, November 26, 1992 and January 6, 1993.

Complaint D74/93

2. a) He failed to file with the Society within six months of the termination of his fiscal year ending November 30, 1991, a statutory declaration in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of the regulation made pursuant to the Law Society Act.

REASONS FOR FINDING OF PROFESSIONAL MISCONDUCT

After considering the evidence which will be referred to in more detail below, the Committee has established that there is to be a finding of professional misconduct with respect to both complaints. The Committee deals first with Complaint D36/93, this complaint is that the Solicitor failed to provide a reply to the Law Society regarding a complaint by another solicitor despite various correspondence between the Society and the impugned Solicitor, requesting a response. In fact, a complaint was issued on January 21st, 1993, and the Solicitor responded in writing on February 3rd, 1993, thereby doing what the Law Society had originally requested him to do.

Nevertheless, the finding of misconduct is made in part because the conduct did actually occur. In and of itself, this complaint may not appear to be of great seriousness, but taken together with the Solicitor's attitude and past discipline record, the facts in that complaint gave rise to some concern.

Dealing next with Complaint D74/93, that complaint is that the Solicitor has failed to file with the Society within six months of the termination of his fiscal year ending November 30th, 1991, the requisite forms. Despite numerous correspondence between the Law Society and the Solicitor, and despite the Solicitor's oral statement to the Law Society's employees, the Solicitor has failed to file the necessary forms as of the date of the hearing by this Committee.

The Solicitor had also been suspended for not paying his Errors and Omissions fees, but we were informed that the Solicitor has brought the Errors and Omission fees up to date. Therefore, the Solicitor remains delinquent in respect to his annual filing.

It is important to have regard to the past discipline history of this Solicitor. Before us was filed the Report and Decision of the Discipline Committee as adopted by Convocation dated February 16th, 1993. In that Discipline Report, the Committee noted that that offense was indeed the second offense for the Solicitor in a very short period of time. Accordingly, the offense which comes before this Committee is the third offense.

For the Solicitor's first offense, he was given a Reprimand. This was administered by a Committee in July of 1992.

On the second occasion, the Solicitor was suspended for a one month period.

For the reasons set out above, having regard to the facts of this case and also having regard to the past discipline record the Committee adopts the submissions of the Law Society's counsel to the effect that the Solicitor be suspended for three months.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Francis Lewis Reilly be suspended for a period of three months and thereafter until such time as the filings are made.

REASONS FOR RECOMMENDATION

In making this recommendation and in adopting the Law Society's submissions, the Committee has regard to the deterrent effect and the protection of the public interest. Unless the Solicitor correctly files the necessary filings and fees, the Solicitor cannot be governed by the Law Society and the public interest is not protected.

The Solicitor for the Law Society informed the Committee that the Solicitor was impecunious, and for that reason alone, costs are not awarded against the Solicitor.

The suspension of three months is to come into effect at the conclusion of the previous suspension of one month which Convocation decreed that the Solicitor must undergo in its decision adopting the previous Discipline Report. The three month suspension will start to run at the conclusion of the administrative suspension. The suspension will be for a fixed period of three months and then will continue until such time as the filings are made.

Francis Lewis Reilly was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 9th day of April, 1976.

ALL OF WHICH is respectfully submitted

DATED this 18th day of August, 1993.

Thomas G. Bastedo
Chair

It was moved by Mr. Brennan, seconded by Ms. Elliott that the Report of the Discipline Committee be adopted.

There were no submissions and the Report was adopted.

It was moved by Mr. Brennan, seconded by Ms. Sealy that the Recommendation as to Penalty that is that the solicitor be suspended for 3 months and thereafter until such time as the filings are completed, be adopted.

An amendment was made in the third paragraph under the Reasons for Recommendation by replacing the word "administrative" with the word "discipline" so that the sentence would then read: "The three month suspension will start to run at the conclusion of the discipline suspension."

Submissions were made by the solicitor that he had in effect been suspended for 3 months already because of the effect on his practice of a previous suspension.

Submissions in support of the recommended penalty were made by Society's counsel.

Counsel, the solicitor, the reporter and the public withdrew.

It was moved by Mr. Wardlaw, seconded by Mr. Bragagnolo that the solicitor be suspended for 1 month to come into effect on the completion of the present period of suspension and thereafter until his books and records were brought into order.

Not Put

It was moved by Ms. Palmer but failed for want of a seconder that the matter be adjourned for 1 month.

The Recommendation as to Penalty that the solicitor be suspended for a period of 3 months such suspension to take effect upon completion of the current suspension and thereafter until such time as the filings are made, was adopted.

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision.

Counsel and the solicitor retired.
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Convocation took a brief recess at 11:15 a.m. and resumed at 11:30 a.m.
.....

RE: RONALD DOUGLAS BRIDGEWATER, Whitby

The Secretary placed the matter before Convocation.

The reporter was sworn.

Mr. Neil Perrier appeared for the Society. The solicitor appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 7th June, 1993, together with an Affidavit of Service sworn 16th August, 1993 by Louis Katholos that he had effected service on the solicitor by registered mail on 23rd June, 1993 (marked Exhibit 1). The Record Book was filed as Exhibit 2 and the Factum filed as Exhibit 3. Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Thomas G. Bastedo, Chair
Stuart Thom, Q.C.
Mrs. Netty Graham

In the matter of
The Law Society Act
and in the matter of

Neil Perrier
for the Society

RONALD DOUGLAS BRIDGEWATER
of the Town
of Whitby
a barrister and solicitor

Not Represented
for the solicitor

Heard: March 2, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On July 6, 1992 Complaint D116/92 was issued against Ronald Douglas Bridgewater alleging that he was guilty of professional misconduct.

The matter was heard in public on March 2, 1993 before this Committee composed of Thomas G. Bastedo, Chair, Stuart Thom, Q.C. and Mrs. Netty Graham. Mr. Bridgewater attended the hearing and was unrepresented. Neil Perrier appeared on behalf of the Law Society.

DECISION

The following particulars of professional misconduct were found to have been established:

2. a) He failed to co-operate in an examination of his books and records carried out by the Audit Department.
- b) He failed to reply to the Staff Trustee's Office despite letters dated August 14, 1991, November 25, 1991, November 26, 1991, December 3, 1991, January 2, 1992, January 29, 1992, February 4, 1992, March 18, 1992 April 30, 1992 and May 21, 1992 and a telephone request on December 19, 1991.
- c) He failed to satisfy his undertaking to the Law Society, dated July 30, 1991 to reply to the Law Society's written communications within one week of receipt of such communications by failing to reply to the Staff Trustee's letters dated August 14, 1991, November 25, 1991, November 26, 1991, December 3, 1991, January 2, 1992, January 29, 1992, February 4, 1992, March 18, 1992, April 30, 1992 and May 21, 1992.
- d) He failed to satisfy a personal undertaking dated October 26, 1990, given to Ronald Fromstein, a fellow solicitor, to facilitate the sale of Part Lot 13, Conc. 9, Township of Scugog.
- f) He failed to file with the Society within six months of the termination of his fiscal year ended January 31, 1991, a statutory declaration in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the rules thereby contravening Section 16(2) of the regulation made pursuant to the Law Society Act.

Evidence

Part of the evidence before the Committee contained the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D116/92 and is prepared to proceed with a hearing of this matter on March 2 and/or 3, 1993.

II. IN PUBLIC/IN CAMERA

2. The parties agree that this matter should be heard in public pursuant to Section 9 of the Statutory Powers Procedure Act.

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D116/92 and, save and except particulars 2(a) and (e), admits the particulars contained therein. The Solicitor further admits that these particulars and the facts as set out in this Agreed Statement of Facts constitute professional misconduct.

IV. FACTS

4. The Solicitor was a sole practitioner in Port Perry and was called to the Bar on February 15, 1980.

Particular 2(a)

Failure to Co-Operate in Examination of Books and Records by the Audit Department

5. At Document Book, Tab 1 is a chronology of the attempts to contact the Solicitor and results from May 3, 1991 through January 20, 1992 with a view to examining the Solicitor's books and records in accordance with Section 18 of the Regulation made pursuant to the Law Society Act.

6. There were three attempts to communicate to the Solicitor by correspondence which are contained in the chronology.

7. At Document Book, Tab 2 is a registered letter sent to the Solicitor dated May 28, 1991 from Ms. Marie Morley, an examiner in the Audit Department. Ms. Morley was assigned to investigate the Solicitor in March, 1991 on the basis of information received that he had abandoned his practice.

8. At Document Book, Tab 3 is a registered letter dated November 27, 1991 from Ms. Morley to the Solicitor in a further attempt to examine the Solicitor's books and records.

9. At Document Book, Tab 4 is a further letter from Ms. Morley to the Solicitor indicating that if arrangements could not be made for an examination of his books and records prior to February 5, 1992, the matter would be referred to the Discipline Committee.

10. On February 6, 1992, the Solicitor left a package of material at the Society's reception addressed to the examiner. The package contained the Solicitor's trust records, but not his general ledgers and fee accounts which had also been requested. Further attempts to contact the Solicitor were unsuccessful and Complaint D116/92 was issued and served.

11. On November 16, 1992, an examiner attended at the Solicitor's residence and with his permission and assistance conducted an examination of his books and records. Other than a few minor discrepancies the books and records were generally found to be in order. A copy of the Audit Department's Report dated November 16, 1992, with summary at schedule F is attached as Appendix "A".

Particular 2(b)

Failure to Reply to the Staff Trustee's Office

12. As a result of information received by the Law Society that the Solicitor had abandoned his practice, the Staff Trustee was assigned to this matter. At Document Book, Tab 5 is a summary prepared by Ms. Patricia Rogerson, Staff Trustee, which details the attempts made by the Staff Trustee to contact the Solicitor and to have him complete various tasks required in the winding up of his practice. The summary refers to several correspondence from the Law Society to the Solicitor from May 1, 1991 through August 5, 1992 (see Document Book, Tabs 6-9, 11-15, 17-25).

13. From the commencement of the Staff Trustee's involvement, the Solicitor has failed to co-operate with the Staff Trustee to address concerns expressed about a number of the Solicitor's former clients. These clients include Mr. Paul Osterland, Mr. and Mrs. Paziuk, Mr. and Mrs. Brown, and Mr. George Smith. Since the Solicitor's letter to Ms. Rogerson on February 4, 1992 (Document Book, Tab 16) the Solicitor has failed to reply to the Law Society's Staff Trustee's Office.

Particular 2(c)

Failure to Satisfy an Undertaking Given to the Law Society Dated July 30, 1991

14. The Solicitor entered into a written Undertaking dated July 30, 1991 (Document Book, Tab 26) by which he undertook as follows:

1. *To respond promptly to all communications from the Law Society; in respect of written communications, within one week of receipt of such communications, and in the case of telephone communications, within three days of receipt thereof;*

15. As is evident with respect to the above-mentioned correspondence from the Law Society, the Solicitor is in breach of particular #1 of the said Undertaking.

Particular 2(d)

Failure to Satisfy a Personal Undertaking Dated October 26, 1990
Given to Mr. Ronald Fromstein, a Fellow Solicitor,
to Facilitate the Sale of Part Lot 13, Conc. 9, Township of Scugog

16. The Solicitor acted for the vendor (Caridi) in a real estate transaction which closed on October 26, 1990. On closing, the Solicitor gave a four point personal Undertaking (Document Book, Tab 27) to Mr. Ronald Fromstein, solicitor for the purchasers (Hall).

17. A chart summarizing attempts made by Mr. Fromstein and the Law Society is contained at Document Book, Tab 28.

18. On December 12, 1990, Mr. Fromstein wrote to the Solicitor about the Undertaking (Document Book, Tab 29). On January 14, 1991 (Document Book, Tab 30) and on January 14, 1991, Mr. Fromstein again wrote to the Solicitor seeking a reply to his December 12, 1990 letter (Document Book, Tab 31).

22nd September, 1993

19. On February 1, 1991, the Solicitor replied to the above letters, stating that he was seeking instruction from his client (Document Book, Tab 32).
20. On April 4, 1991, Mr. Fromstein wrote to the Solicitor advising him that the Law Society would be contacted if the matter was not dealt with in writing within one week (Document Book, Tab 33).
21. On May 1, 1991 (Document Book, Tab 6), a follow-up letter was sent to the Solicitor requesting a response to the letter dated April 11, 1991.
22. At Document Book, Tabs 7 and 8, are letters dated May 24, 1991 and June 11, 1991 from the Law Society to the Solicitor regarding the same matter.
23. There was no reply from the Solicitor and on June 26, 1991 the Law Society sent a letter by registered mail (Document Book, Tab 9), advising that the matter would be turned over to the Discipline Department if a reply was not forthcoming.
24. On July 24, 1991, the Solicitor wrote to the Law Society (Document Book, Tab 10) advising that he was in the process of obtaining a declaration from his clients to fulfill the Undertaking. The Law Society responded to the Solicitor with a letter dated August 14, 1991 (Document Book, Tab 11) requesting a copy of the declaration once obtained.
25. On November 25, 1991, the Law Society again wrote to the Solicitor regarding the Undertaking and a copy of that letter is contained at Document Book, Tab 12. The Solicitor did not reply in writing to this letter, however, in a conversation with the Solicitor on January 7, 1992, an examiner advised him to contact Patricia Rogerson, Staff Trustee, who, as he was aware, had also made numerous attempts to contact him. On January 13, 1992, the Solicitor telephoned Patricia Rogerson and stated that he was still in the process of obtaining the required declaration from Mr. Caridi which he mentioned in his July 24, 1991 letter.
26. On March 18, 1992 the Law Society again wrote to the Solicitor regarding the Undertaking, among other matters, and requested a reply to all points of concern set out in the letter. A copy of that letter is contained at Document Book, Tab 13. To date, the Solicitor has not replied to this letter.
27. Mr. Fromstein finally contacted the solicitor for the vendor in the previous purchase and sale transaction and obtained a copy of the corrective deed without the assistance of the Solicitor.

Particular 2(e)

Engaged in the Practice of Law While Under Suspension by
Order of Convocation Since March 28, 1991 for Non-Payment of Annual Fees

28. The Solicitor was suspended on March 28, 1991 for failure to pay his annual fees. He remains suspended at this date. At Document Book, Tab 35 is a memorandum to discipline counsel setting out the dates of four (4) notices sent to the Solicitor advising him of his default in payment and impending suspension on the following dates:

1st Notice	-	August 24, 1990
2nd Notice	-	November 16, 1990
3rd Notice	-	January 18, 1991
4th Notice	-	February 27, 1991.

29. A registered letter was sent to the Solicitor dated April 2, 1991 (Document Book, Tab 36) advising him that his rights and privileges as a member had been suspended from March 28, 1991, until his fees had been paid. The letter was returned unclaimed.

30. A notice of the Solicitor's suspension was published in the Ontario Reports [May, 1991, 2 O.R. (3d)].

31. On April 2, 1991, the Solicitor closed a mortgage transaction between K. Sherban and Canada Trustco. He deposited the mortgage funds in his trust account on April 9, 1991 and disbursed most of the funds to K. Sherban on the same date. On May 9, 1991, the Solicitor disbursed the balance of funds in trust regarding this transaction to his general account for fees and disbursements. The fee billing is dated April 2, 1991 and the report to the client is dated May 9, 1991.

32. On April 1, 1991, the Solicitor paid the commission owing to the real estate broker regarding the Popowich Estate sale which closed on March 26, 1991. However, although the transaction closed and the sale proceeds were received (and booked) on March 26, 1991, the funds were not deposited by the Solicitor in his trust account until April 1, 1991 (almost one week later and after the Solicitor's suspension). On May 3, 1991, the Solicitor transferred \$664.00 to his general account for fees and disbursements related to this sale transaction. The fee billing is dated April 10, 1991 and the reporting letter is dated May 3, 1991.

33. On May 7, 1991, the Solicitor disbursed the sum of \$1,070 for fees regarding the Popowich Estate. The file contained a statement of account which shows this transfer and is dated May 7, 1991 but there was no fee billing or reporting of the estate to the client(s) as of the date of the examiner's audit on November 16, 1992. On May 9, 1991 five other disbursements were made from trust to the beneficiaries of the Popowich Estate (from the proceeds of the sale).

34. On May 9, 1991, the Solicitor disbursed \$160.00 to his general account regarding a civil litigation matter for his client MacGuinness. The fee billing is dated March 26, 1991 and the report to the client is dated May 8, 1991.

35. On July 24, 1991, the Solicitor disbursed the funds held in his trust account for the Estate of Joan Huston to the estate bank account (not controlled by the Solicitor). He also transferred \$38.50 to his general account in payment of a disbursement incurred by him on behalf of the estate. The billing for this reimbursement is dated July 24, 1991.

36. An audit of the Solicitor's books and records indicates that as at November 16, 1992, the Solicitor continued to hold the appropriate sum of \$3,453.89 in his trust accounts.

Particular 2(f)

Failure to File With the Society His Annual Filings for the Fiscal Year Ended January 31, 1991

37. The Solicitor's fiscal year ends January 31st. The last filing received from the Solicitor is for the period ended January 31, 1990. The Solicitor has not submitted the filing for the period ended January 31, 1991. A Notice of Default in Annual Filing dated August 9, 1991 was delivered to the Solicitor (Document Book, Tab 42).

38. A further registered letter dated September 19, 1991 was delivered to the Solicitor (Document Book, Tab 43).

22nd September, 1993

39. The Solicitor has accrued late filing charges of \$1,500 regarding the January 31, 1991 filing, which he has not paid.

40. A member is required to file a report completed by a public accountant within six months of the termination of the member's fiscal year. The Solicitor was, therefore, required to have submitted his report for January 1, 1991 by July 31, 1991. The Solicitor has breached subsection 2 of section 16 of the Regulation.

Prior Discipline
May 15, 1990

41. The Solicitor was reprimanded in Committee for failing to file his Forms for the fiscal years ending January 31, 1986, 1987, 1988 and 1989.

DATED at Toronto, this 26th day of February, 1993."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Ronald Douglas Bridgewater be suspended for a period of three months and thereafter until his filings are brought up to date.

REASONS FOR RECOMMENDATION

In this matter of Ronald Douglas Bridgewater, there were put forward to the Committee six different particulars in which it was alleged that the Solicitor was guilty of professional misconduct.

On the motion of the Society and concurred in by Mr. Bridgewater, paragraph 2(e) has been withdrawn and therefore will be struck from the complaint.

Paragraphs 2(b), (c), (d) and (f) are admitted by the Solicitor and therefore there will be a finding of professional misconduct in respect of the Solicitor's actions on those particulars.

Paragraph 2(a) is left to be dealt with by this Committee. An Agreed Statement of Fact was filed which was signed by the Solicitor and by Discipline Counsel. Other evidence was given orally by the Solicitor. In the result, your Committee has no hesitation in finding that the Solicitor failed to co-operate in an examination of his books and records carried out by the Audit Department.

The Solicitor stated that he was not aware that the Society was to examine all of his books and records and thought that the Society wished only to examine his trust records. He also brought his trust records to the Society after a lengthy and unexplained delay. For these reasons, a finding is made.

In respect of all of these particulars, it is the Society's position that the Solicitor be suspended for a period of three months from the date of the order of Convocation.

The Solicitor is not employed or practising law as a Solicitor but is working for a government agency in a non-legal related capacity. A suspension, if granted, therefore will not affect him in his day to day life at this time.

22nd September, 1993

In addition, the Solicitor did not object strenuously to the suspension being urged upon the Committee by Discipline Counsel. Having reviewed this Agreed Statement of Facts in detail, and taking into account the submissions made by the Discipline Counsel and the Solicitor, the Committee agrees and recommends a suspension of three months.

Second, the Solicitor has not filed his Form 2's and 3's as of January 31st, 1991. Discipline Counsel therefore urges that this Committee suspend the Solicitor until the filings are brought up to date. The Committee so recommends.

Finally there are several files in the Solicitor's possession which in one way or another are connected to a sum of \$3,453.89, which sum is now deposited in the Solicitor's trust account. Discipline Counsel, on behalf of the Staff Trustee, has urged that those files be transferred to the Staff Trustee together with the sum of \$3,453.89. The Solicitor did not object to this request and the Committee so orders. The Committee leaves it to Discipline Counsel and the Solicitor to work out the exact details of the transfer of the files, including the names of the files and the connection between those files and the sum in question. If there are difficulties between Discipline Counsel and the Solicitor, then the Committee may be spoken to.

In conclusion on the question of costs, having regard to the Solicitor's obligations as a sole parent, his other financial circumstances and the cooperation recently accorded by the Solicitor to the Society, we are of the view that this is not a matter for costs.

Ronald Douglas Bridgewater was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 15th day of February, 1980.

ALL OF WHICH is respectfully submitted

DATED at Toronto, this 7th day of June, 1993

Thomas G. Bastedo
Chair

The Report of the Discipline Committee was adopted.

It was moved by Ms. Kiteley, seconded by Ms. Sealy that the Recommendation as to Penalty that is, that the solicitor be suspended for 3 months and thereafter until his filings were brought up to date, be adopted.

There were joint submissions by the solicitor and counsel for the Society that the solicitor be permitted to resign.

Counsel, the solicitor, the reporter and the public withdrew.

It was moved by Mr. Somerville, seconded by Mr. Bragagnolo that the matter be adjourned to a date to be set following the disposition of other matters or contemporaneous with the report of other discipline charges on the solicitor's undertaking not to practice.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision.

22nd September, 1993

The solicitor gave an oral undertaking to Convocation not to practice and waived the requirement for a quorum composed of those Benchers present in Convocation.

Counsel and the solicitor retired.
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RE: JAMES WILLIAM ORME, Hamilton

The Secretary placed the matter before Convocation.

The reporter was sworn.

Mr. Wardlaw withdrew.

Ms. Christina Budweth appeared on behalf of the Society and the solicitor appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 21st September 1992, together with an Affidavit of Service sworn 10th October, 1992 by Louis Katholos, that he had effected service on the solicitor by registered mail and by courier on 25th September, 1992 (marked Exhibit 1) together with the Acknowledgement, Declaration and Consent signed by the solicitor 22nd September, 1993 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Ronald D. Manes, Chair
J. James Wardlaw, Q.C.
Mrs. Netty Graham

In the matter of
The Law Society Act
and in the matter of

Christina Budweth
for the Society

JAMES WILLIAM ORME
of the City
of Hamilton
a barrister and solicitor

Not Represented
for the solicitor

Heard: May 13, 1992
June 11, 1992

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On January 17, 1992, Complaint D8/92 was issued against James William Orme, alleging that he was guilty of professional misconduct.

The hearing was heard in public (with the exception of Mr. Orme's evidence which was heard in camera) on May 13, 1992 and June 11, 1992 before this Committee composed of Ronald D. Manes, Chair, J. James Wardlaw, Q.C. and Mrs. Netty Graham. Mr. Orme attended the hearing and was not represented. Christina Budweth appeared on behalf of the Society.

DECISION

The following particular of professional misconduct was found to have been established:

Complaint D8/92

2. a) He failed to reply to the Law Society regarding a complaint by Donald Ambrose, despite letters dated October 10, 1991 and November 19, 1991 and telephone requests on November 5, 1991 and November 13, 1991.

Evidence

Part of the evidence before the Committee contained the following Agreed Statement of Fact:

"AGREED STATEMENT OF FACT"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D8/92 and is prepared to proceed with a hearing of this matter on May 13, 1992.

II. IN PUBLIC/IN CAMERA

2. The parties agree that this matter should be heard in public pursuant to Section 9 of the Statutory Powers Procedure Act.

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D8/92 and admits that he failed to reply to the Law Society regarding a complaint by Donald Ambrose, despite letters dated October 10, 1991 and November 19, 1991.

IV. FACTS

4. The Solicitor is a sole practitioner practising in the City of Hamilton. The Solicitor was called to the bar on March 29, 1977.
5. Donald Ambrose was a client of the Solicitor. The Solicitor represented Mr. Ambrose in a criminal trial at the conclusion of which Mr. Ambrose was convicted of manslaughter, fraud and theft. He was sentenced to ten years and eight months imprisonment.

22nd September, 1993

6. By letter dated September 23, 1991, received by the Society on September 27, 1991, Mr. Ambrose complained of the Solicitor's failure to release his, Mr. Ambrose's, file to his new counsel, John Hill. A copy of Mr. Ambrose's letter of complaint is attached as Exhibit 1 to this agreed statement of facts.

7. The Society corresponded with the Solicitor on October 10, 1991, enclosed with the Society's letter was a copy of the client's letter of complaint. The Solicitor was requested to respond to the Society within two weeks. A copy of the Society's October 10 letter is attached as Exhibit 2 to this agreed statement of facts.

8. Following the expiry of the two week period for reply outlined in the Society's October 10 letter, a staff member of the Society telephoned the Solicitor. During that telephone conversation the Solicitor advised the staff member that he was under tremendous pressure in his practice which had contributed toward his failure to reply. In addition, the Solicitor stated that he felt that to comply with the client's request would jeopardize his, the former client's, position. The Solicitor was advised the Society required a reply.

9. The Society corresponded with the Solicitor again on November 19, 1991, a copy of this correspondence is attached as Exhibit 3 to this agreed statement of facts. In the Society's November 19 letter, the Solicitor was reminded of his obligations pursuant to Rule 13 of the Rules of Professional Conduct and advised that if his written reply was not received within seven days the matter would be referred to the chair of discipline.

10. The Solicitor responded to the Society's correspondence outlined above by letter dated February 20, 1992, a copy of which is attached and marked as Exhibit 4 to this agreed statement of facts. The Society has confirmed that the Solicitor did deliver a large box of material constituting the client's file to Mr. Hill in Coburg on or about January 31, 1992.

DATED at Toronto this 13th day of May, 1992."

DECISION

A majority of the Committee find that the Solicitor is guilty of professional misconduct in failing to respond to letters to the Society.

REASONS OF MAJORITY

On July 21, 1991 the Solicitor was asked by a former client to release documents the Solicitor was holding in order to assist new counsel employed by the former client to prepare an appeal from conviction. The new lawyer also asked for such material.

For reasons that are difficult to understand, the Solicitor failed to do so. As a result, a complaint was made to the Society.

The Society wrote to the Solicitor on October 10th and again on November 19th, 1991. Telephone calls were made to his office on November 5th and 13th. The complaint was issued on January 17, 1992 and served on January 22, 1992. A response was received on February 22, 1992.

22nd September, 1993

Mr. Orme gave evidence that he telephoned the Society shortly after receiving the October letter. He appears to have said that he could not respond at that time because of the "tremendous pressure" he was under. He was, in effect, asking for more time. At no time did he take the position that he would not respond in writing or that the telephone call was to be his response.

The telephone call cannot, by itself, be the response that was required by the Society. It was merely an acknowledgement that the complaint was received.

To be a response, a solicitor has to respond to the contents of a complaint either by agreeing to do something or by advising the Society that he or she is refusing to do something. In the normal case, if there is a refusal to do something the lawyer must indicate such reasons for refusal as will in his or her opinion take the matter outside of the purview of the Society.

In this case the Society did give him more time - more than two months of additional time. The Solicitor failed to take advantage of the extra time given. The complaint was properly laid.

A majority of the Committee find that the Solicitor is guilty of professional misconduct.

James William Orme was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 29th day of March, 1977.

ALL OF WHICH is respectfully submitted

DATED this 21st day of September, 1992

J. James Wardlaw

THE LAW SOCIETY OF UPPER CANADA

REPORT AND DECISION OF THE
DISCIPLINE COMMITTEE

REPORT AND DECISION
OF THE DISCIPLINE COMMITTEE

IN THE MATTER OF)
)
THE LAW SOCIETY ACT)
)
AND IN THE MATTER OF)
)
JAMES WILLIAM ORME)
)
of the City of Hamilton)
)
a barrister and solicitor)

On January 17, 1992, Complaint D8/92 was issued against James William Orme, alleging that he was guilty of professional misconduct.

22nd September, 1993

The hearing was heard in public (with the exception of Mr. Orme's evidence which was heard in camera) on May 13, 1992, June 11, 1992 and January 28, 1993 before this Committee composed of Ronald D. Manes, Chair, J. James Wardlaw, Q.C. and Mrs. Netty Graham. Mr. Orme attended the hearing and was not represented. Christina Budweth appeared on behalf of the Society.

The Committee was divided on whether the solicitor was guilty of professional misconduct with the majority being of the view that the Complaint was made out and the minority dissenting in that regard. Penalty Submissions were made but our Decision held in abeyance until Mr. Orme decided whether to appeal to Convocation the finding of guilt by the Committee. For some reason, the original Report and Decision of the Discipline Committee was remitted to Convocation and heard by it before the Committee reconvened on the issue of penalty. In any event, Convocation rightfully remitted the matter back to Committee for a determination of penalty which hearing proceeded on January 28th, 1993.

It is the unanimous view of the Committee that the proper penalty in this case is a reprimand in Committee together with \$500.00 in costs or expenses pursuant to Sections 34 and 40 of The Law Society Act. We are of the view that the costs order is fairly nominal having regard to the actual expense incurred by the Law Society. It is of some note that this matter has been before this Committee on a number of occasions and there have been substantial legal and factual issues involved resulting in the majority of minority opinion. We say this to underscore the nominal nature of the costs order sought against the solicitor by The Law Society. The solicitor has asked and The Society is not opposed to 60 days to pay costs.

Mr. Orme was fully informed regarding the requirement of waiving the right to appeal to Convocation before any such penalty could be administered. Mr. Orme does not wish to waive that right, and advised that he will appeal the Committee's decision to Convocation. Accordingly, the matter must await such appeal and if proceed with, a disposition by Convocation.

We are advised that Convocation has asked us to consider what the record should consist of for Convocation. The record shall consist of the usual and ordinary record that every committee remits to Convocation, that being the Complaint, agreed Statement of Fact and the Reasons for the Decision of the Committee both in its majority and minority.

Apparently we have also been asked by Convocation to consider the effect upon this Committee of the motion brought by Mr. Orme before Convocation which motion, dated October 21st, 1992, asks Convocation to consider Complaints D8/92, D91-0097, and D91-2609 in light of the "overall atmosphere between Mr. Orme and The Law Society of Upper Canada's Discipline Committee". Mr. Orme has stated to this Committee that what he really seeks is a sub-committee of The Law Society or some forum to air his concerns regarding his treatment by The Law Society.

Ms. Budweth advises that Complaints D91-0097 and D91-2609 are not before the Discipline Committee but rather before Complaints. In fact, D91-2609 has already been withdrawn. In any event, the Committee's responsibilities are set out in The Law Society Act and Regulation. The Committee has no jurisdiction, right or obligation to entertain the solicitor's concerns. It is open to the solicitor to take his concerns to the Chair and/or Vice-Chairs of Discipline or to sit down and discuss these concerns directly with representatives of the Discipline Department.

22nd September, 1993

In conclusion, the Committee has now served its statutory function and is functus subject to the appeal and disposition by Convocation.

ALL OF WHICH is respectfully submitted

June 4th, 1993

Ronald D. Manes

THE LAW SOCIETY OF UPPER CANADA

DISSENT OF

REPORT AND DECISION OF THE
DISCIPLINE COMMITTEE

IN THE MATTER OF THE LAW SOCIETY ACT

AND IN THE MATTER OF JAMES WILLIAM ORME,
of the City of Hamilton,
a barrister and solicitor.

DECISION OF THE DISCIPLINE COMMITTEE
in a hearing held in Convocation Room,
Osgoode Hall, Toronto, Ontario at
9:30 a.m., Wednesday May 13, 1992.

BEFORE:

Ronald D. Manes, Esq., Chair
James J. Wardlaw, Q.C. Bencher
Mrs. Netty Graham, Bencher

COUNSEL:

Ms. C. Budweth, Counsel for the Law Society
James W. Orme, Appeared, unrepresented

MR. MANES (DISSENTING)

I have had the opportunity of reading the transcribed Reasons of the majority of the committee from which I respectfully dissent.

At the conclusion of the Hearing, oral reasons were expressed which are now being reduced to written reasons, having regard to the fact that the Solicitor had advised that he will pursue an Appeal.

The Solicitor, James William Orme, is charged with professional misconduct in that he failed to reply to the Law Society regarding a complaint by client Donald Ambrose despite letters dated October 10, 1991 and November 19th, 1991, and telephone requests on November 5th, 1991 and November 13th, 1991. The Solicitor chose to represent himself during the course of these proceedings.

22nd September, 1993

Two Agreed statement of Facts have been filed in respect to those allegations, being Exhibit 2 and Exhibit 4. Exhibit 2, relates to the merits of the matter, while Exhibit 4 relates to the previous discipline record of the Solicitor.

The Solicitor was called to the bar in 1977 and during the relevant periods, conducted an extensive general practice which essentially was comprised of a number of branch offices and a number of practices that he had acquired in or about the early 1980's. At the relevant times, the Solicitor's practice appeared to be in a state of disarray. He was involved with the Law Society in several matters. He, as he put it, had a warehouse full of files that he could not get to. He was losing one, if not two, of his major lawyers who ran branch offices; one of them ran the Dundas branch and the other ran a considerable and complicated matrimonial practice.

The Solicitor's evidence was often confused in the sense that the Solicitor focused his testimony on these various maladies that beset him during this period of time that occasioned the Complaint in question. In my view, the evidence is quite clear that the Solicitor was obligated to comply with his client's request to turn over the boxes of materials which he held. It is quite clear that the Solicitor, for the misguided reasons which he communicated to the Law Society, did not comply with his client's request, and it is quite clear to me that the failure to do so in a timely and prompt way would have constituted professional misconduct, if that were the Complaint. However, the Complaint here is one of failure to reply and that is the conduct to which I will address my remarks.

The real issue that client Ambrose complained of in his letter to the Law Society, dated September 23rd, 1991, was with respect to obtaining the files and documentation and an extensive set of writings that formed the basis of a book that he had proposed to write, all of which were in the Solicitor's possession. Although the letter complains about the Solicitor's neglect to write an opinion letter to Legal Aid that he had requested in respect to his conviction for manslaughter, theft and fraud in the course of a matter that the Solicitor represented him in, the letter to the Law Society in fact requests their assistance in "taking whatever steps you feel necessary to accomplish the following" and then asks for these files and documentation and extensive set of writings. I am assisted in that view by the fact that the Law Society agrees that the Solicitor's ultimate written reply of February 20th, 1992, in respect to the return of the files, was satisfactory.

It is my view that the real substance of the Complaint then is that the Solicitor refused to reply or failed to reply to the Law Society with respect to the turning over of these boxes of information to the client or his new solicitor for the purposes of an appeal.

It is also my view that the failure to reply was associated and originated with the October 10th, 1991 letter from the Law Society to the Solicitor; that is, had the Solicitor replied to that letter in a satisfactory way, then the subsequent dates upon which he had allegedly refused or neglected to reply, that being November 5th, 1991; November 13th, 1991 and November 10th, 1991, would not have arisen.

Accordingly, although Ms. Budweth was persuasive in terms of her submissions that the Committee could amend the Complaint so as to separate these various dates, in my respectfully view, one could not do that, as the gravamen of the offense was the failure to reply to the October 10th, 1991 letter from the Law Society. To amend the Complaint would fundamentally change the nature of the offense and essentially change the theory of the Law Society's case.

22nd September, 1993

Although the Solicitor did not focus himself on what constitutes a reply, that nevertheless is my focus, and I submit should be the focus of the Committee. Any Solicitor should know - and I generally accept - that the best way to reply to the Law Society and the generally accepted practice is to reply in writing. On the facts of this case the Solicitor did not reply in writing (excepting his ultimate February 20th, 1992 written reply). However, in my respectful view, reply he did not subsequent to October the 10th, 1991 letter from the Law Society, although this reply was outside of the two week period within which the Law Society requested a reply.

The Solicitor had a discussion with Denise Hargreaves who was called as a witness by the Law Society at the Solicitor's request for the purpose of cross-examination. Under cross-examination, Ms. Hargreaves, who is a secretary to the Complaints Officer, Deborah Torbica (who also gave evidence) testified that sometime in October of 1991, which the parties have agreed was subsequent to the two week period required by the Law Society, a conversation took place which, in the usual course, would have been recorded on a message transaction form, a form used by the Law Society. However, this form was not used or resorted to by the secretary because she was new and did not know about it. (That form and the subsequent telephone discussions are contained in Exhibit number 3).

On that approximate date, there was a discussion with the Solicitor. She recalled, although unassisted by the message transaction form, that the Solicitor told her that he had a tremendous number of boxes which he did not wish to pass to the lawyer in Cobourg, that is the lawyer that was going to advise Mr. Ambrose regarding an appeal. She vaguely remembered that there was a conversation regarding two human bodies not being found and could recall little else of the conversation. The Solicitor testified that during the course of that conversation, he told the witness that he was under a terrific pressure, and more importantly, that he did not want to turn the boxes over because he perceived that they contained materials which should not go to anybody. He testified - consistent with that - that he had a discussion with her about his concerns in some detail.

The question is whether that conversation constitutes a reply. In my view, that conversation does constitute a reply. Rule 13 provides:

"The lawyer should assist in maintaining the integrity of the profession and should participate in its activities."

Under the Commentary, number 3, it states:

"The lawyer has a duty to reply promptly to any communication from the Society".

It should be noted that the Rule, on its face, does not require a written reply, but rather "reply" is the operative word qualified only by "promptly".

I am also of the view that the Solicitor's reply was also a reply that the Solicitor intended to be responsive and was responsive to some degree to the reply requested in the Law Society's October 10th, 1991 letter. Basically the Solicitor's reply was that he did not want to release the boxes of materials because he felt that the materials contained evidence that was harmful to his client Ambrose. Although the reply was certainly misguided, and may on its face seem to be unresponsive, I accept the evidence of the Solicitor corroborated to some extent by Ms. Hargreaves' evidence that the Solicitor was bone fide in his reply to the Law Society.

22nd September, 1993

It is my view that if the discussion with Ms. Hargreaves was a reply, it was a prompt reply as it replied to the Law Society's inquiries within a few weeks approximately of the time period in which the Law Society thought that the Solicitor should reply. The letter from the Law Society contemplates that the Solicitor might take more than two weeks to reply for it says:

"If you have any questions or comments or if you cannot reply in writing with a period of two weeks, please contact me by telephone"

There is a footnote to Rule 13 which quotes from a decision of Mr. Justice Walsh and although the decision does not really elucidate the meaning of "reply", and whether it has to be in writing or not, the portion of the decision that is repeated is as follows:

"The reprehensible thing about the Solicitor's conduct is his indefensible ignoring of the communications of the Law Society".

In my view, the purpose of Rule 13, and specifically Rule 13(3) is that solicitors not ignore the inquiries by their Law Society. It is a good practice, safe practice and a reasonable practice that those replies be in writing, but that is not necessarily required as a matter of law. If it were, then the drafters of the Rules would simply have provided that a solicitor has a duty to reply in writing promptly to any communication from the Law Society.

Solicitors who read the Rule and the Commentary may reasonably interpret it as I have just stated, and should not be held to another interpretation, a stricter interpretation, especially in the context of a Discipline Proceeding.

It is interesting, as well, to note that in the letter to Mr. Orme dated October 10th, 1991, the Complaints Officer, Deborah Torbica, states at the end of her letter that as previously quoted: "if you have any questions or comments or if you cannot reply in writing within a period of two weeks, please contact me by telephone". Now that indicates that according to the writer, there are various ways to respond to the Law Society. The preferable way is certainly in writing, but it leaves open contact by telephone, and I think that the Solicitor has every reason to be able to reply on that method of communication in the absence of any strict requirement to the contrary. In fact, the Law Society has a procedure for dealing with communications that are not in writing which is embodied in Exhibit number 3, the message transaction forms, which are used to record replies and other forms of messages from solicitors.

Having regard to that practice, the contents of the letter from Ms. Torbica, dated October 10, 1991, the wording of Rule 13(3), the Commentary, the uncontroverted evidence of Ms. Hargreaves and the evidence of the Solicitor, it is my view that the Solicitor did reply to the Law Society. Accordingly, this Complaint has not been made out.

ALL OF WHICH is respectfully submitted

Ronald D. Manes

September 4, 1992

It was moved by Ms. Kiteley, seconded by Mr. Brennan that the majority Report of the Discipline Committee be adopted.

There were submissions by the solicitor who argued that Convocation should adopt the minority dissent.

22nd September, 1993

Counsel for the Society supported the majority decision.

There were questions from the Bench.

The solicitor resiled from the Agreed Statement of Facts insofar as it was an admission that he did not reply.

Counsel, the solicitor, the reporter and the public withdrew.

It was moved by Mr. Cullity, seconded by Mr. Bragagnolo that the minority view be adopted.

Carried

The motion put by Ms. Kiteley that Convocation accept the majority view was lost.

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision.

Counsel and solicitor retired.

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CONVOCATION ROSE AT 1:20 P.M.

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Confirmed in Convocation this day of , 1993.

Treasurer